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COURTING ISLAM: PRACTICAL ALTERNATIVES TO A MUSLIM FAMILY COURT IN ONTARIO

*How do we honor two commitments, to multiculturalism and equity to the rule of law, that often seem to come into conflict? We have been struggling a bit. There really are conflicting values.**

I. INTRODUCTION

In the modern secular state there is a tension between the desire of the state to keep religion out of the public sphere, and thus not interfere with individual freedoms, and the need of religious individuals to live as required by the tenets of their particular faith. Liberalism may concern itself with individual autonomy, but critiques of liberalism within the West have emphasized the need to consider the communal rights of minority groups, including religious groups.¹ Islam, like some other faiths, prescribes a model of living for its adherents that encompasses the spectrum of daily life whether they live in an Islamic state or not.² Critiques of liberalism have made a range of suggestions for minority groups, such as Muslims living in non-Islamic, Western democracies, that would grant them the ability to exercise communal rights.³ But this ongoing debate has yet to find the optimal way of protecting liberal ideals while also accommodating religious needs. Canada, like other liberal

* Clifford Krauss, *When the Koran Speaks, Will Canadian Law Bend?*, N.Y. TIMES, Aug. 4, 2004, at A4 (quoting Marion Boyd, former Ontario Attorney General and Women's Issues Minister).

1. See generally Vernon Van Dyke, *The Individual, the State, and Ethnic Communities in Political Theory*, in THE RIGHTS OF MINORITY CULTURES 31 (Will Kymlicka ed., 1995); Chandran Kukathas, *Are There Any Cultural Rights?*, in THE RIGHTS OF MINORITY CULTURES 228 (Will Kymlicka ed., 1995); WILL KYMLICKA, MULTICULTURAL CITIZENSHIP (1995) (emphasizing the need to consider communal rights); cf. Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, in THE RIGHTS OF MINORITY CULTURES 93 (Will Kymlicka ed., 1995); Leslie Green, *Internal Minorities and their Rights*, in THE RIGHTS OF MINORITY CULTURES 256 (Will Kymlicka ed., 1995) (considering the difficulties associated with communal rights).

2. See generally FREDERICK M. DENNY, AN INTRODUCTION TO ISLAM (2d ed. 1994) (discussing the Islamic religious system in Part III).

3. See generally KYMLICKA, *supra* note 1; INTERCULTURAL DISPUTE RESOLUTION IN ABORIGINAL CONTEXTS (Catherine Bell & David Kahane eds., 2004) [hereinafter INTERCULTURAL DISPUTE RESOLUTION]; THE RIGHTS OF MINORITY CULTURES (Will Kymlicka ed., 1995).

democracies, faces the challenge of accommodating⁴ the needs of its Muslim citizens while staying true to the ideals of its founding principles. Religious accommodation requires the state, the believer, and the religious community to compromise in order to reconcile fidelity to religion with fidelity to the secular ideals that make religious freedom possible.

Syed Mumtaz Ali, the President of the Canadian Society of Muslims,⁵ sees a major problem with Canadian democracy, in particular its handling of minority rights, and has proposed a way to reconcile these competing fidelities.⁶ He believes that the system has “[fallen] far short of the promise and potential that democratic theory has for meeting the social and political needs of a truly multicultural society.”⁷ The Canadian Society of Muslims suggests that a way of dealing with this failure of Canadian democracy is to establish Muslim arbitration tribunals.⁸ These tribunals would enable Muslims to consent to their jurisdiction for disputes involving family law, including marriage, divorce, inheritance, and custody. The tribunals would issue binding, court-enforceable decisions based on Muslim family law, subject to review in limited circumstances only.⁹

In Part II, this Note will examine the Canadian Society of Muslims’ criticisms of Canadian democracy and their plan to establish Muslim arbitration tribunals. It will also describe attempts made to reconcile secular and religious law in other countries including England, Australia, and the United States. It will focus on divorce as an example of the way in which compromise can be achieved between the state and religious

4. Ayelet Shachar has defined “accommodation” in the multicultural context, including religion, as referring to “a wide range of state measures designed to facilitate identity groups’ practices and norms.” AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS* 17 (2001).

5. The Canadian Society of Muslims is a non-profit Islamic organization founded in the 1960s by Dr. M. Qadeer Baig in Toronto, Ontario, and describes its main purpose as follows, “to promote interest in an intellectual, philosophic, and esoteric approach to the research, development and understanding of Islamic culture and civilization . . . and to co-operate with other organizations . . . which have objects similar in full or in part to the objects of the corporation.” Canadian Society of Muslims, *Who We Are*, <http://muslim-canada.org/whoarewe.htm> [hereinafter *Who We Are*] (last visited Oct. 31, 2005).

6. See generally Syed Mumtaz Ali & Anab Whitehouse, *Oh! Canada! Whose Land, Whose Dream?* (The Canadian Society of Muslims 1991) <http://muslim-canada.org/ocanada.pdf> [hereinafter *Oh! Canada!*] (last visited Sept. 12, 2005).

7. *Id.*

8. Syed Mumtaz Ali, *Establishing an Institute of Islamic Justice (Darul Qada)* (The Canadian Society of Muslims 2002), <http://muslim-canada.org/news02.html> [hereinafter *Darul Qada*] (last visited Oct. 31, 2005).

9. *Id.*

communities. In Part III, this Note will examine the meaning of religious freedom in Canada. In Part IV, this Note will examine the suggestions made by court reform commissions in Ontario and how the Muslim arbitration tribunals would fit into the Ontario court structure. It will look at the concerns inherent in incorporating Alternative Dispute Resolution (ADR) into family law generally and more specifically at questions surrounding the incorporation of religious ADR into family disputes. In Part V, this Note will examine the legal basis for the Muslim arbitration tribunals through the Ontario Arbitration Act of 1991.¹⁰ In Part VI, this Note will utilize a model of multicultural accommodation to suggest the practical alternatives available to Ontario. Finally, this Note will conclude that while the Act may allow for the establishment of Muslim arbitration tribunals, policy concerns advise against it and warrant an approach similar to the one used by England, Australia, or the United States. This approach is a combination approach that utilizes the private, ad hoc mechanisms of the Muslim community together with an awareness and openness of the courts and legislatures to take into account the needs of its Muslim citizens.

II. CRITICISMS OF DEMOCRACY AND ATTEMPTS AT RECONCILIATION

A. Mumtaz Ali's Criticisms of Canadian Democracy

While all religions seek to provide believers with a blueprint for daily living, Islam, along with Judaism, provide much more. With detailed systems of law, Islam and Judaism have maintained a closer kinship to one another than to their third counterpart, Christianity.¹¹ Concerned with

10. Arbitration Act 1991, S.O. 1991, c. 17, (Can.), available at http://www.elaws.gov.on.ca/tocBrowseCL_E.asp?lang=en.

11. See F.E. PETERS, CHILDREN OF ABRAHAM (1982). According to Peters,

It is the person and the acts of Jesus that are crucial to Christianity, and it is precisely Jesus who separates the typology of Christianity from that of both Judaism and Islam. Both Muslim and Jew are covenantors for whom the path to holiness lies in fidelity of heart and observance to that covenant. The Christian is asked not so much fidelity as faith, faith in Jesus who is, in his own person, the New Covenant. Jew and Muslim measure their fidelity by a deeply considered and articulated body of *halakoth*, behavioral norms that are the touchstone of orthopraxy; the Christian measures his faith by the instruments of orthodoxy, creeds, and definitions. The archetypical figure in traditional Judaism and Islam is the legal scholar, the rabbi or *'alim*; in traditional Christianity it is the priest, the mediator who, like the Arch-Mediator Christ, bridges the gap between the human and the divine.

Id. at 198–99.

the here and now, both Islam and Judaism place an emphasis on the perfect practice of their believers, referred to as orthopraxy by some scholars, rather than on the intricacies of metaphysics.¹² The names for their divine law, *sharia*¹³ and *halacha*,¹⁴ mean “the way” or “the path” indicating that the manner in which the journey is undertaken is just as, if not more important than acceptance of doctrine.¹⁵ More than simply a sketch, they provide adherents with a detailed guide accompanied by precise regulations for daily life that encompass everything from prayer to personal grooming, religious sacrifice to diet, and charity to banking.¹⁶ In some areas, the religious regulations do not infringe upon the requirements of the secular state. In other areas, adherents may find they must either choose between the two or perform a double set of obligations, one religious and one secular, as in the case of divorce.¹⁷ The Canadian Soci-

12. See DENNY, *supra* note 2, at 113. Denny succinctly states the relationship between the orthoprax religions of Islam and Judaism and the metaphysical centered Christianity, “Judaism, like Islam, is an orthoprax religion. Law has been the characteristic preoccupation of religious scholarship in Judaism, whereas theology has been central in Christianity.” *Id.* at 151.

13. Literally, *sharia* means “the way to the water hole” but other meanings include “the right path” and the late Islamic scholar, Fazlur Rahman, referred to it as “the ordaining of the way.” *Id.* at 195.

14. IRVING GREENBERG, *THE JEWISH WAY* 20 (Touchstone 1993) (1988).

15. Although Islamic law provides very detailed guidance to the believer, it is not monolithic and the law is not found entirely in the *Quran*. The two main sources of Islamic law are the *Quran*, the divine revelation, and the *Sunnah*, the sayings and deeds of the Prophet Muhammad. *Fiqh*, or Islamic jurisprudence, is derived from these main sources through their early interpretation by Muslim jurists. Varied interpretation of the sources led to several schools (*madhahib*) of Islamic law. There are four major schools of Islamic law in the Sunni tradition (Hanafi, Malaki, Shafi'i, Hanbali) of which 90 percent of Muslims around the world belong to. The other 10 percent of Muslims belong to one of several Shia traditions (including the Zaydis, Ismailis, and Imamis). See DENNY, *supra* note 2, at 195–215; Bill Powell et. al., *Struggle for the Soul of Islam*, TIME, Sept. 13, 2004, at 46. In many ways the early development of Islamic law bears similarities to the development of Anglo-American common law. The divine statutes of the *Quran* and *Sunnah* were interpreted through judicial opinion (*ra'y*), analogy (*qiyas*), adoption by others (*istihsan*), and consensus (*ijma'*). See generally JAMAL J. NASIR, *THE ISLAMIC LAW OF PERSONAL STATUS* (3d ed. 2002); JOHN L. ESPOSITO & NATANA J. DELONG-BAS, *WOMEN IN MUSLIM FAMILY LAW* (2d ed. 2001); DENNY, *supra* note 2; DAVID WAINES, *AN INTRODUCTION TO ISLAM* (1995).

16. As Jamal Nasir writes, “From the days of the Prophet, Islam was not just a religion but a complete code for living, combining the spiritual and the secular, and seeking to regulate not only the individual’s relationship with God, but all human social relationships.” NASIR, *supra* note 15, at 2.

17. For a discussion of the dilemmas faced by religious adherents in the modern state and those faced by the state in accommodating religion as an integral part of human

ety of Muslims' critique of Canadian democracy stems from the situations in which the individual believer or the Muslim community as a whole cannot adhere to Islam's mandates.

The Canadian Society of Muslims' critique of and plan to overhaul Canadian democracy is laid out in Mumtaz Ali's 1991 discussion paper, *Oh! Canada! Whose Land, Whose Dream?*.¹⁸ Mumtaz Ali's criticism begins with the notion that a key component is missing from Canadian democracy, and that component is sovereignty.¹⁹ Sovereignty "involves the desire to have substantial control over, or play a fundamental role in, shaping one's destiny."²⁰ *Oh! Canada!* asserts that white Canadians are the only group with sovereignty over their affairs²¹ and that while democracy should be based on a social contract, the majority precludes the minority from participating fully in the agreement.²²

Oh! Canada! goes on to argue that rights afforded by the government are not absolute, but rather, based on a compromise to ensure that competing interests are taken into account on behalf of both the individual and the collective.²³ Canadian democracy, in order to live up to its ideals, must spread the wealth of sovereignty evenly.²⁴ Achieving equality does not require everyone to be treated identically but rather requires that no

rights law see T. Jeremy Gunn, *The Complexity of Religion and the Definition of "Religion" in International Law*, 16 HARV. HUM. RTS. J. 189 (2003).

18. See *Oh! Canada!*, *supra* note 6, at 2.

19. See *Oh! Canada!*, *supra* note 6, at 12. The discussion of sovereignty begins with a discussion of a decision of the British Columbia Supreme Court that "denied the land claims of a group of Native people" because they had been superceded by the British colonial power. *Oh! Canada!* interprets this decision as saying, "that one source of sovereignty has a perfect right to extinguish the sovereignty of another people, and, thereby, make any claim for autonomy, on the part of the latter people, null and void." *Id.*

20. *Id.* at 19.

21. *Id.* at 13. *Oh! Canada!* equates "white" Canadians with "'mainstream,' majoritarian Canadians or their political representatives" excluding Quebecois and immigrant communities. *Id.*

22. *Id.* at 18. See also JEFF SPINNER, *THE BOUNDARIES OF CITIZENSHIP* (1994). In his chapter on Pluralistic Integration, Skinner recognizes the critique that "demands for diversity [in the liberal state] . . . have often fallen on deaf ears." *Id.* at 79. This critique has led some to argue that although liberals may like the idea of "neutral rules," which treat everyone the same, in reality, it does not work this way. *Id.* Rather, the "most powerful group will define the standards of a society's institutions" and other groups will "have to adhere to these standards." *Id.* at 79.

23. See *Oh! Canada!*, *supra* note 6, at 20.

24. *Id.* at 21. See also Iain T. Benson, *Notes Towards a (Re)definition of the "Secular"*, 33 U.B.C. L. REV. 519-49 (2000) (arguing that liberal society must begin to understand what aspects of faith are necessary to society and then allow religiously informed belief to become a part of the public arena).

group be given a preference.²⁵ Democracy can offer a spectrum of possibilities for individuals and groups to make choices in line with their own needs if they are given the ability to control their affairs internally.²⁶

In another report of the Canadian Society of Muslims, President Mumtaz Ali recounts the history of the campaign to create a more suitable environment for Muslims living in Canada.²⁷ In 1986, the founder of the Canadian Society of Muslims, Dr. Baig, submitted a proposal to the Ontario Courts Inquiry suggesting that Muslim Personal Law²⁸ be taken into account in the commission's study.²⁹ Dr. Baig's recommendations were not adopted and after his death, Syed Mumtaz Ali assumed the leadership of the Canadian Society of Muslims.³⁰

Oh! Canada! includes a detailed plan for constitutional reform,³¹ election reform,³² senate reform,³³ and judicial reform.³⁴ The authors use French Canadians and the Native peoples³⁵ as examples which illustrate

25. See *Oh! Canada!*, *supra* note 6, at 22.

26. *Id.* Mumtaz Ali's criticisms of Canadian democracy are similar to the theories of multicultural theorists like Will Kymlicka, Charles Taylor, and Iris Young who argue that the so-called neutral institutions of society will always have some bias towards the cultural tradition of the majority. See SHACHAR, *supra* note 4, at 22–25 (summarizing the arguments of early multicultural theorists).

27. See Syed Mumtaz Ali, *A Word from the President: Campaign up to 1997*, Canadian Society of Muslims (on file with the *Brooklyn Journal of International Law*) [hereinafter *A Word from the President*].

28. Muslim family law and personal status law are used interchangeably. One helpful definition of the areas included within personal status law is the one used by the Tunisian government:

Personal Status shall include disputes over the status of the persons and their legal capacity, marriage, property dispositions between spouses, mutual rights and duties of the spouses, divorce, repudiation and judicial separation, parentage, acknowledgement or disavowal of paternity, family and descendants relationships, maintenance duties among relatives and others, rectification of parentage, adoption, tutelage, guardianship, interdiction, attainment of majority, gifts, inheritance, wills and other acts taking effect subsequent to death, the absent person and the declaration of a missing person to be dead.

Tunisian Presidential Decree of 11/26/1376 AH, 6/26/1957 AD, Raid 51-57-19, art. 2, quoted in NASIR, *supra* note 15, at 30–31.

29. See *A Word from the President*, *supra* note 27.

30. *Id.*

31. *Oh! Canada!*, *supra* note 6, at 29–33.

32. *Id.* at 10–12.

33. *Id.* at 23–27.

34. *Id.* at 27–29.

35. The comparison of the plight of the Native peoples to the problems facing the Muslim community is not a convincing comparison. The aboriginal peoples of North America and elsewhere were forcibly uprooted from their lands and deprived of their

the problems of sovereignty and how they have been addressed within Canadian society.³⁶ These examples are then correlated to the problems facing the Muslim minority in Canada.³⁷ The authors argue that rather than having separation between church and state, those in positions of government leadership promote an “anti-religious” rather than a “neutral” perspective.³⁸ This anti-religious perspective conceals animosity towards particular religions, such as Islam, and hinders the free exercise of religion.³⁹ Public education is one area where these biases become evident.⁴⁰ Another area where Muslims find themselves at a disadvantage, argue Mumtaz Ali and Whitehouse, is in the area of family and personal status law.⁴¹ The authors initially sought to gain official recognition

sovereignty by European settlers who saw the Natives’ land as vacant. Aboriginal peoples have been forced to adapt to an uncompromising legal system that ignores their viewpoints. See Larissa Behrendt, *Cultural Conflict in Colonial Legal Systems: An Australian Perspective*, in INTERCULTURAL DISPUTE RESOLUTION, *supra* note 3, at 116. See also SHACHAR, *supra* note 4, at 26 n.42 (noting that theorist Will Kymlicka views minority nations as having greater claims than religious groups because minority nations are entitled to “territorial self-government” whereas religious groups are not); FREEDOM OF RELIGION AND BELIEF: A WORLD REPORT 105 (Kevin Boyle & Juliet Sheen eds., 1997) [hereinafter FREEDOM OF RELIGION AND BELIEF] (stating that some of the worst acts of religious discrimination have been committed against indigenous Canadian peoples).

36. See *Oh! Canada!*, *supra* note 6, at 39.

37. *Id.*

38. *Id.* See also Ayelet Shachar, *The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority*, 35 HARV. C.R.-C.L. L. REV. 385, 389–92 (2000) (discussing the early multicultural writings that criticized “blindness-to-difference” policies for their lack of neutrality).

39. *Oh! Canada!*, *supra* note 6, at 39. See Ahmad Yousif, *Islam, Minorities and Religious Freedom: A Challenge to Modern Theory of Pluralism*, 20 J. MUSLIM MINORITY AFF. 1, 32 (2000) (arguing that despite the emphasis on religious freedom and equality in the Western liberal state, Christian religions are “more equal” than non-Christian minorities). See also SPINNER, *supra* note 22. Spinner looks at liberal society and the experiences of several ethnic, racial, and national communities in the United States and Canada including two, the Jews and the Amish, which are both ethnic and religious. Spinner discusses the division of liberal society into the public and private realms and suggests that liberal society encourages individuals to keep things like religious identity in the private sphere. *Id.* at 6. Spinner admits that “the demands of liberal citizenship in the public sphere and in civil society,” a third realm he identifies in liberal society, “make it hard, although not impossible, for liberal citizens to maintain robust ethnic identities.” *Id.*

40. See *Oh! Canada!*, *supra* note 6, at 40. Roman Catholic schools remain publicly funded because of the carryover of a clause into the Charter from the British North America Act that gave protected status to “denominational, separate or dissentient” schools. For a concise explanation and comparison of funding of religious schools among Canadian provinces see FREEDOM OF RELIGION AND BELIEF, *supra* note 35, at 108–09.

41. See *Oh! Canada!*, *supra* note 6, at 41. Mumtaz Ali and Whitehouse include marriage, divorce, separation, maintenance, child support, and inheritance in personal law. *Id.*

of Muslim personal law in order for the Muslim community to be able to regulate this area internally.⁴² This would allow the Muslim community to establish and fund tribunals to settle disputes in the area of personal law.⁴³ The logistics for implementing such a plan are detailed in a later proposal by Syed Mumtaz Ali.⁴⁴ Since 2002, however, Mumtaz Ali has taken a different approach.⁴⁵ While it is not clear that Mumtaz Ali has abandoned the idea of court-connected tribunals, for now he has opted to establish private Muslim arbitration tribunals under the auspices of the Ontario Arbitration Act of 1991⁴⁶ that would nonetheless issue court-enforceable decisions.⁴⁷

One area over which the Muslim arbitration tribunals could eventually have jurisdiction is divorce.⁴⁸ While the laws governing Muslim marriage and divorce vary throughout the schools of Islamic law, there are several shared principles that will aid in understanding how the tribunals will operate and their potential consequences.⁴⁹ Marriage in Islam is

42. *Id.* at 43.

43. *Id.*

44. See Syed Mumtaz Ali, *The Review of the Ontario Civil Justice System: The Reconstruction of the Canadian Constitution and the Case for Muslim Personal/Family Law, A Submission to the Ontario Civil Justice Review Task Force* (Canadian Society of Muslims 1994), <http://muslim-canada.org/submission.pdf> [hereinafter *Review of the Ontario Civil Justice System*] (last visited Sept. 12, 2005). See also *A Word from the President*, *supra* note 27.

45. See *Darul Qada*, *supra* note 8. See also Syed Mumtaz Ali, *Why Was the Institute Formed?* (Canadian Society of Muslims 2004), <http://muslim-canada.org/IICJ.html> [hereinafter *Why Was the Institute Formed?*] (last visited Oct. 31, 2005).

46. Arbitration Act 1991, S.O. 1991, c. 17, (Can.), available at http://www.elaws.gov.on.ca/tocBrowseCL_E.asp?lang=en.

47. See *Darul Qada*, *supra* note 8. According to Mumtaz Ali,

We will be able to . . . appoint our own Muslim arbitrators and non-Muslim associate arbitrators to act as 'private judges' apply our own Muslim Personal Law, including family law (e.g. marriage, *khula* [divorce initiated by wife or by consent of both spouses], divorce, custody, guardianship, *mehr* [dowry], division of property, wills and inheritance, gifts, *waqf* [charitable trusts], etc.) . . . Arbitrators' decisions ("awards") are final in almost all cases. In the event that one of the parties [to] arbitration decides to renege on their initial agreement to accept and comply with the Arbitration decision, we will be able to enforce those arbitration decisions ("awards") with the help of the Ontario/Canadian justice system.

Id.

48. *Id.* Currently, divorce law is governed by federal law, not Ontario provincial law, but establishing jurisdiction over divorce is one of the goals of the Islamic Institute of Civil Justice. *Id.*

49. See generally DAWOUD S. EL ALAMI, *THE MARRIAGE CONTRACT IN ISLAMIC LAW* (1992) (discussing the variations among the schools of Islamic law).

viewed as a contract and, while expected to be permanent, Islam places importance on allowing spouses to separate who are unable to live out the ideals of marriage.⁵⁰ The most common form of divorce is known as *talaq*, or repudiation, which gives the husband the right to divorce his wife for any reason or no reason.⁵¹ In such cases, the husband must pay the wife her *mahr*, or dowry, to which she is entitled.⁵² Another form of divorce is known as *khul'*, which is initiated by the wife, consented to by the husband, and usually requires the wife to sacrifice part or all of her dowry.⁵³ By no means comprehensive, these terms will aid in understanding not only the Ontario Muslim arbitration tribunals but the approaches taken in England, Australia, and the United States as well. As will be seen below, the Canadian Society of Muslims' proposal is neither the first time a Muslim community has sought to gain recognition of Muslim family law in a secular state, nor is Canada the first country to confront the dilemmas of a conflict between religious and secular law.

B. Attempts to Reconcile Secular and Religious Law

Muslims living in the West have always faced difficulties obtaining recognition for Muslim family law.⁵⁴ Unlike the status of Islamic law in predominantly Muslim countries such as in South Asia⁵⁵ or the Middle

50. See ESPOSITO & DELONG-BAS, *supra* note 15, at 28.

51. See DAWOUD SUDQI EL ALAMI & DOREEN HINCHCLIFFE, ISLAMIC MARRIAGE AND DIVORCE LAWS OF THE ARAB WORLD 22 (1996) (providing an overview of Islamic marriage and divorce law before discussing the codified Muslim personal law of the Arab world). There are several variations of *talaq*, some of which are considered more acceptable such as *talaq al-Sunna* (divorce in accordance with the teachings and customs of the Prophet Muhammad), but the variations all include a unilateral repudiation by the husband that in most cases does not have to be in writing or witnessed. *Id.* at 23–25. See also ESPOSITO & DELONG-BAS, *supra* note 15, at 27–32.

52. See ESPOSITO & DELONG-BAS, *supra* note 15, at 18–35.

53. See EL ALAMI & HINCHCLIFFE, *supra* note 51, at 27–28; ESPOSITO & DELONG-BAS, *supra* note 15, at 32; JAMAL J. NASIR, THE STATUS OF WOMEN UNDER ISLAMIC LAW 78–80 (1990). Another form of divorce by agreement is known as *mubaraah*, which refers to divorce where both spouses desire to end the marriage. ESPOSITO & DELONG-BAS, *supra* note 15, at 32.

54. See DAVID PEARL & WERNER MENSKI, MUSLIM FAMILY LAW (3d ed. 1998).

55. *Id.* at 51 n.1. Pearl and Menski discuss that Muslim personal law “is the majority law in Pakistan and Bangladesh and it also governs a substantial minority in India.” *Id.* at 29. South Asian Muslim law is “a hybrid form of Islamic law . . . with many national and regional variations. The authors write, “some of the liveliest jurisprudential debates about Muslim law today are conducted in South Asia.” The authors suggest that the discussions, debates, and difficult questions raised in South Asia “bring with [them] many instructive parallels for the development of Muslim law in the West today.” *Id.* at 30. In the era of European colonization, the European powers applied European law to matters of business but left family law to the realm of local custom and religion resulting in a

East,⁵⁶ most Western nations, such as England, Australia, and the United States, do not incorporate religion into the legal system. Western states have prevented the recognition of Islamic law and have relegated it to the private realms of culture.⁵⁷ Western nations have viewed Islam as inconsistent with notions of human rights and have characterized Islam in general as opposed to Western values.⁵⁸ Although this rejection by their governments creates tension, many Muslims living in Western nations have not or will not abandon Islam or Islamic law.⁵⁹

1. English Muslim Law—*Angrezi Shariat*

Muslim family law in England is an example of a creative and pragmatic interplay between Muslim law and the Western state.⁶⁰ Although, the government has been resistant in many ways to accommodate non-Christian religious traditions,⁶¹ it has made some progress in conjunction with the creative initiatives of the Muslim community. In the late 1960s and early 1970s, the United Kingdom witnessed an influx of Muslim

“pluralist family law” in those places with “culturally and religiously diverse populations.” Ann Lacquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. 540, 548 (2004). In the case of British colonization, while matters of family law were left to the jurisdiction of the religious communities, Britain made use of so-called repugnancy clauses that reserved to the colonial power the right to not recognize certain practices if they were viewed as irreconcilable with “morality, humanity or natural justice.” The relics of this system can still be found today in countries such as Kenya and India. SHACHAR, *supra* note 4, at 79.

56. See generally NASIR, *supra* note 15.

57. See PEARL & MENSKI, *supra* note 54, at 51.

58. *Id.*

59. *Id.* See also Ihsan Yilmaz, *Muslim Alternative Dispute Resolution and Neo-Ijtihad in England*, 2 ALTERNATIVES: TURKISH J. INT'L REL. 117, 118 (2003), available at <http://alternativesjournal.net/volume2/number1/yilmaz.pdf> (arguing that non-recognition of Islamic law by the state in a predominantly non-Muslim society does not make Islamic law disappear) (last visited Oct. 31, 2005).

60. See PEARL & MENSKI, *supra* note 54, at 52.

61. Education is one realm where the British government continues to resist religious accommodation. The Anglican Church remains the state church of England and religious education and worship remain a part of state schools. In the Education Reform Act 1988, the government reaffirmed its commitment to Christian tradition and teachings in schools by requiring religious teaching in schools to “reflect the fact that the religious traditions in Great Britain are in the main Christian whilst taking account of the teaching and practices of other principal religions represented in Great Britain.” Andrew Bainham, *Family Law in a Pluralistic Society: A View From England and Wales*, in FAMILIES ACROSS FRONTIERS 301–02 (Nigel Lowe & Gillian Douglas eds., 1996) (quoting the Education Reform Act of 1988).

immigrants⁶² seeking economic and educational opportunities but wishing to retain their religious and cultural practices.⁶³ As the community grew in strength and numbers, it began to organize and build institutions to protect the interests of the growing Muslim community.⁶⁴ In 1975, in an attempt to demand official recognition of Muslim family law, the Union of Muslim Organisations (UMO), an association aiming to be the representative and lobbying group of Muslims in the United Kingdom and Ireland,⁶⁵ proposed changes to England's family law.⁶⁶ The UMO's proposal was very similar to that of Mumtaz Ali's plan, but failed miserably.⁶⁷ Although the UMO's proposal had the support of over 150 Muslim organizations,⁶⁸ it did not, however, suggest the establishment of

62. In 1970, there were 300,000 Muslims in Great Britain. By 1987, that number grew to 1.5 million. See ANTHONY BRADNEY, *RELIGION, RIGHTS AND LAWS* 3 (1993). As of 2001, there were 1.6 million Muslims comprising three percent of the population and more than half of the total non-Christian population. National Statistics, Britain, *Religious Populations* (2001), DirectGov, United Kingdom, <http://www.statistics.gov.uk/ci/nugget.asp?id=954>.

63. Manazir Ahsan, *The Muslim Family in Britain, in GOD'S LAW VERSUS STATE LAW* 21 (1995). The overwhelming majority of these immigrants came from India, Pakistan, and Bangladesh. *Id.* at 23.

64. Among the institutions built at the time were mosques and Islamic centers, and the establishment of movements to increase the availability of Halal food and Islamic education. Ahsan also points out that the community grew through British converts to Islam. See Ahsan, *supra* note 63, at 21.

65. See ReDirectory of Faith Communities, Union of Muslim Organisations of UK and Eire, <http://www.theredirectory.org.uk/orgs/umouk.html> (last visited Oct. 31, 2005). The aims of the UMO include "coordinat[ing] the activities of all Muslim organisations in the UK and Eire, and to be the representative body of British Muslims in negotiations with the British government and other governments and international bodies. The UMO has also established a National Muslim Education Council which "offers help to teachers, such as guidelines and a syllabus for Islamic education. The UMO offers help to individual Muslims to practise the tenets of Islam while at work." Islamic Shari'a Council, *Introduction*, <http://www.islamic-sharia.co.uk/main.html>.

66. See PEARL & MENSKI, *supra* note 54, at 58.

67. The Islamic Shari'a Council recognizes this failure on its website in its description of the necessity of the Council. It does not mention the UMO's proposal by name but refers to a proposal fitting its description and states that, "The answer was clear, unequivocal: one country, one law! We have abandoned in our legislation, what was traditionally known as the Christian view-point, so how can we be expect[ed] to legislate according to Islamic Law?" Islamic Shari'a Council, *Preface*, <http://www.islamic-sharia.co.uk/preface.html> [hereinafter *Preface*].

68. See Sebastian Poulter, *The Claim to a Separate Islamic System of Personal Law for British Muslims*, in *ISLAMIC FAMILY LAW* 147 (Chibli Mallat & Jane Connors eds., 1990). Mumtaz Ali does not claim to have the support of any organization beyond the organization he leads, the Canadian Society of Muslims, and although it has a rather inclusive name, the Society does not appear to represent a significant number of Canadian Muslims. See *Who We Are*, *supra* note 5.

separate Muslim tribunals. The late author Sebastian Poulter, a specialist in law relating to ethnic minority traditions in England,⁶⁹ posits several reasons why the UMO's plan received such a negative reception.⁷⁰ He suggests that the conflict between the English tradition of a unified family law and the Muslim desire to incorporate Muslim personal law into English law, the conflict between the various schools of Islamic law and deciding which one would apply,⁷¹ the conflict between the civil courts applying religious law or instead a separate religious court,⁷² and the conflict between certain aspects of Muslim family law and various human rights treaties⁷³ all contributed to the plan's cold reception. But even if the UMO had chosen a particular school of Islamic law, proposed the establishment of Muslim arbitration tribunals, and excised all practices of gender inequality from Islamic law, it is unlikely that the proposal would have had a greater success. As Poulter points out, considering the centrality of the issues and values dealt with in family law, the possibilities are remote that English society would accept the complete division of family law into religious denominations.⁷⁴

Notwithstanding this rejection, Muslims have continued to seek recognition for Muslim family law in England and have made progress. This has been evident in the courts and the legislature as well as in the development of an ad hoc, extra-legal system known as *angrezi shariat*, or English Muslim law.⁷⁵ English Muslim law remains unrecognized by the state, but this hybrid law, which allows English Muslims to adhere to both English and Islamic law, has become a conspicuous and accepted

69. See *Notes on the Contributors*, in ISLAMIC FAMILY LAW ix (Chibli Mallat & Jane Connors eds., 1990); *Contributors*, in GOD'S LAW VERSUS STATE LAW viii (Michael King ed., 1995).

70. See Poulter, *supra* note 68, at 157.

71. See generally DENNY, *supra* note 2 (describing development of Islamic law and the various schools of Islamic jurisprudence).

72. Unlike Mumtaz Ali's proposal, the UMO proposal did not suggest the establishment of separate Islamic courts.

73. See Poulter, *supra* note 68, at 157–64. Treaties potentially implicated by official recognition of Muslim family law include the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Discrimination Against Women. *Id.* at 160.

74. *Id.* at 158. For a review of marriage law in Great Britain including the Marriage Acts 1949 to 1990 see BRADNEY, *supra* note 62, at 39–58. For a review of the history of freedom of worship in England see SEBASTIAN POULTER, ENGLISH LAW AND ETHNIC MINORITY CUSTOMS 207–27 (1986).

75. See PEARL & MENSKI, *supra* note 54, at 58. The term *angrezi shariat* was coined by Professors Menski and Pearl. It is a transliteration of Urdu and reflects the South Asian majority in the British Muslim community. *Id.*

part of the Muslim community in England.⁷⁶ The Islamic Shari'a Council has been influential in the establishment of *angrezi shariat*.⁷⁷ The Council, modeled after the Jewish community's *Beit Din*, advises in marital disputes and gives guidance on other matters of Muslim family law.⁷⁸ The Council also gives expert advice to lawyers and courts and is comprised of representatives of the major schools of Islamic jurisprudence. Sparked by the failure of the UMO's proposal and the sense of alienation among some English Muslims, the Council seeks to provide an Islamic forum for dealing with the problems and disputes of the Muslim community while also increasing acceptance for Islam and Islamic law in the West.⁷⁹ Since its formation in 1982, the Council has presided over 4,500 cases, over 95 percent of them related to matrimonial problems.⁸⁰

The Islamic Shari'a Council has played an important role in resolving the dilemmas that adherence to both English and Islamic law can create for English Muslims, particularly in the areas of marriage and divorce. For example, a divorce recognized by the civil courts but not Islamic law will create a "limping marriage" which is recognized as dissolved by the larger community but as still intact by the Muslim community.⁸¹ Through the Council and other organizations, the Muslim community in England

76. *Id.* See also Yilmaz, *supra* note 59, at 118.

77. The Islamic Shari'a Council states its objective as:

[Advancing] the Islamic Religion by: Fostering and encouraging the practice of the Muslim Faith according to the Quran and the Sunnah. Providing advice and assistance in the operation of the Muslim family. Establishing a bench to operate as court of Islamic Shari'a and to make decisions on matters of Muslim Family law referred to it. Doing all such other lawful things as may be in the interest of promoting the proper practice of the Muslim faith in the United Kingdom.

Islamic Shari'a Council, *Aims and Objectives*, <http://www.islamic-sharia.co.uk/main.html>.

78. See PEARL & MENSKI, *supra* note 54, at 78. Pearl and Menski define the *Beit Din* as "a quasi-judicial body, which regulates the affairs of a large number of British Jews." *Id.* It should be noted that the *Beit Din* is a relevant body to orthodox Jews, not the Jewish community in general.

79. See *Preface*, *supra* note 67.

80. Of the requests to help resolve matrimonial disputes, the majority come from Muslim women seeking a divorce. Islamic Shari'a Council, *How it works?*, <http://www.islamic-sharia.co.uk/works.html> [hereinafter *How it Works?*]; Islamic Shari'a Council, *See Who it Represents?*, <http://www.islamic-sharia.co.uk/represents.html>. Those wishing to seek the Council's assistance must register either electronically or by mail and pay a registration fee of £60. There are additional fees of £30 if an interview with a member of the Council is needed or £60 if a divorce certificate is requested. Islamic Shari'a Council, *Forms*, www.islamic-sharia.co.uk/forms.html.

81. See PEARL & MENSKI, *supra* note 54, at 78.

has created dispute resolution settings that put both civil and religious recognition on the same page.⁸² In the area of divorce, for example, a woman whose husband refuses to pronounce *talaq*, and therefore, prevents the religious dissolution of the marriage, can seek assistance from the Council.⁸³ The Council allows both the husband and wife to make their case known to the Council and attempts to bring the parties to reconciliation. But if the husband should refuse to respond to the wife's petition, the Council will take into account the wife's position only and grant the divorce provided she meets the remaining requirements.⁸⁴ Resolving disputes outside of the British court system has grown in popularity among England's Muslim community and many non-matrimonial disputes appear to be resolved in these extra-legal settings⁸⁵ without resort to the civil courts.⁸⁶

The English legal system has also played an important role in facilitating the recognition of Islamic culture into the formal legal system.⁸⁷ In several cases, the courts have taken into account the religious practices of the parties in making their decisions.⁸⁸ Additionally, Parliament has

82. *Id.* See also *How it Works?*, *supra* note 80.

83. See *How it Works?*, *supra* note 80.

84. *Id.* The additional requirements that a wife seeking a divorce must meet include having a valid reason for requesting divorce and relinquishing the *mahr* (gift from husband upon marriage). *Id.* Since the Council will require a woman seeking a divorce to sacrifice her dowry, a woman will potentially receive a better outcome in the civil courts where there have been instances of courts awarding women large shares of their dowry based on principles of contract and equity. See Werner Menski, *Developments in Muslim Law: The South Asian Context*, 3 S.C.C. (Jour.) 9, 9–10 (2000), available at <http://www.ebc-india.com/lawyer/articles/2000v3a2.htm> (last visited Aug. 31, 2005); Werner F. Menski, *Immigration and Multiculturalism in Britain: New Issues in Research and Policy* 4–8 (The Centre for Applied South Asian Studies, University of Manchester, 2002), <http://www.art.man.ac.uk/CASAS/pdfpapers/osakalecture.pdf> (last visited Oct. 31, 2005). See also Islamic Shari'a Council, *Matrimonial Issues: Talaq*, <http://www.islamic-sharia.co.uk/talaq.html> (last visited Oct. 31, 2005).

85. In the context of divorce, the Islamic Shari'a Council strongly recommends that divorcing couples also go through the civil process of divorce as well, presumably to avoid a "limping marriage." Islamic Shari'a Council, *How it Works?*, *supra* note 80.

86. See PEARL & MENSKI, *supra* note 54, at 79.

87. See Sebastian Poulter, *Multiculturalism and Human Rights for Muslim Families in English Law*, in GOD'S LAW VERSUS STATE LAW: THE CONSTRUCTION OF AN ISLAMIC IDENTITY IN WESTERN EUROPE 81, 82 (Michael King ed., 1995).

88. One particularly interesting unreported case is *Ali v. Ali* (2000), discussed by Werner F. Menski in *Immigration and Multiculturalism in Britain: New Issues in Research and Policy* (The Centre for Applied South Asian Studies, University of Manchester, 2002), available at <http://www.art.man.ac.uk/CASAS/pdfpapers/osakalecture.pdf> (last visited Oct. 31, 2005). In this case, two Bangladeshi Muslim professionals residing in the UK negotiated a dowry of £30,001. *Id.* at 6. Not uncommonly, they married under

made efforts through legislation that accommodates religious practices including laws regarding the ritual slaughter of animals for both Muslims and Jews, laws accommodating Sikh men's wearing of turbans and carrying of daggers,⁸⁹ laws protecting religious dress in school,⁹⁰ and a law seeking to avoid the problem of the limping marriage.⁹¹ Legislation such as the Children Act of 1989 requires authorities to give consideration to a child's religious persuasion when considering placement in foster homes.⁹² Parliament has also noted the success of the British Muslim community in dealing with Islamic divorce. While the House of Lords considered the passage of the Religious Marriages Act, a statute not unlike the New York law discussed below, to assist in integrating Jewish religious and civil divorce, it mentioned that the Council had successfully developed its own solution to the problem of limping marriages and

both the Islamic and the secular British law. *Id.* The husband sought a divorce in the British courts and the wife petitioned for her dowry, which the husband refused to pay. *Id.* The High Court judge in London awarded the wife £30,000 (the dowry minus £1). *Id.* at 7. Menski, who acted as an Islamic law expert in the case, explained to the judge that he must consider the "multicultural scenario" because if he only focused on English law and ignored the dowry situation the wife would be driven to a private Shari'a council and out of the public courts. *Id.* at 6–7. The judge, concerned about the wife seeking relief outside of the civil courts, but not willing to fully take into account Islamic law, awarded the wife £1 less. *Id.* at 7. Menski writes,

By giving her £1 less, he applied not Muslim law, but asserted the application of English law, through the English law on equity, with its strong notions of justice and fairness. Thus, he not only helped the woman, but also protected English law from the unrelenting pressure to accept personal laws, such as that of the Muslims, as part of the new British legal framework. The missing £1 is a powerful indicator of how close the contest has become, and how well aware of this problem the English judges now are.

Id. at 8. See also Poulter, *supra* note 87, at 82. Cases discussed by Poulter include *Bakhtiar v. The Zoological Society of London*, [1991] 141 N.L.J. 55, and *Seemi v. Seemi*, [1990] 140 N.L.J. 747.

89. Bradney quotes the Member of Parliament, Sidney Bidwell, who proposed the bill to exempt Sikhs from the Road Traffic Act 1972, which had made it a criminal offense to ride a motorcycle without a helmet and forced Sikhs to choose between their religious requirement of wearing a turban or forsaking it to ride a motorcycle. MP Bidwell asked, "[c]an we seriously say that we are carrying on our tradition of religious tolerance if . . . society imposes its will in such a way that a Sikh begins to turn away from his family religion . . . ?" BRADNEY, *supra* note 62, at 5.

90. See Poulter, *supra* note 87, at 82.

91. Divorce (Religious Marriages) Act, 2002, c. 27 (Eng.).

92. Bainham, *supra* note 61, at 301–02 (citing various sections of the Children Act 1989).

therefore did not require the assistance of this legislation.⁹³ In its final form though, the Act, originally intended to apply only to Jewish divorce, included all religious divorces.⁹⁴

In the area of Muslim family law, this unrecognized *angrezi shariat* status is interestingly in accordance with the historical development of Islamic law, which never regarded family law as a matter for the state.⁹⁵ Rather, family and other local disputes were regulated internally by the community.⁹⁶ This internal regulation, akin to ADR, did not involve state law or its representatives.⁹⁷ British Muslims have carried on this tradition while also continuing to observe the secular laws of England.

93. See 614 PARL. DEB. H.L. (5th ser.) (2000) 115. Lord Lester of Herne Hill described the goal of the proposed legislation:

The Islamic community has sought to resolve problems of “chained” marriages by developing its own solutions and a mechanism for a non-consensual divorce, and British Muslims argue, according to the books I have read, that traditionally the sphere of family law has not been a matter for state law. The Jewish community is not able to deal with the problem without assistance from Parliament because of the biblical nature of the get requirements and the absence of any rabbinical authority to override those requirements in most circumstances However, it is important to avoid any unfair discrimination against the adherents of any religion in our multicultural, plural and democratic society. If there are similar problems in relation to other religions, the victims should have access to the courts for appropriate relief As Mr. Singh indicates in his Opinion, the Bill could be amended to deal with any gap in protection for other religions by empowering the Lord Chancellor to add other religions by order as appropriate, no doubt after consultations before the order is made.

Id. See also Divorce (Religious Marriages) Act, 2002, c. 27 (Eng.).

94. See Divorce (Religious Marriages) Act, 2002, c. 27 (Eng.). The text of the Act demonstrate its universal applicability:

This section applies if a decree of divorce has been granted but not made absolute and the parties to the marriage concerned—(a) were married in accordance with—(i) the usages of the Jews, or (ii) *any other prescribed religious usages*; and (b) must co-operate if the marriage is to be dissolved in accordance with those usages.

Id. (emphasis added).

95. PEARL & MENSKI, *supra* note 54, at 71. Modern states, which officially recognize Muslim personal law have attempted to take control over family law. Examples of countries that recognize Muslim personal law and have attempted to regulate it include Pakistan and Bangladesh. This recognition has led to clashes between the “state-sponsored codified Muslim personal law” and “the traditional shari‘a rules.” But, nonetheless, Pearl and Menski argue that “mutual non-recognition” between the Muslim community and Western legal centralists “is not a viable option from either perspective.” *Id.*

96. *Id.* at 72.

97. *Id.* at 72 n.70.

2. Australia's Rule of Non-Recognition

The Muslim community in Australia remains small, but ever growing. While the total number of non-Christians was reported to be only 2.6 percent of the population in 1991, that number continues to increase due to burgeoning immigration trends.⁹⁸ The 2001 census reported a record number of 281,576 Muslims in Australia with more than one-third of those native-born Australians and an increase of approximately 40 percent over five years.⁹⁹ In response to the changes, particularly through immigration, then Prime Minister Bob Hawke instituted a National Agenda for a Multicultural Australia in 1989.¹⁰⁰ This agenda included a focus on the right of all Australians to express their cultural identity through religion.¹⁰¹ While the agenda centered on the individual right to express one's cultural identity, it also emphasized a commitment to Australian unity and the principles of democracy and individual rights, including gender equality.¹⁰²

Since employing this strategy, Australia has made a start towards accommodating aboriginal marriages. These reforms could be extended to religious marriages as well, but have not been to date. The aboriginal reforms came about as a result of the Australian Law Reform Commission's task of considering how a range of laws could better accommodate cultural diversity.¹⁰³ In response to the Commission's work, the Australian government has employed a rule of non-recognition.¹⁰⁴ The rule of non-recognition operates in the legal sense that aborigines may marry outside of the Australian Marriage Act of 1961 but still obtain societal recognition and an expectation of permanency. The benefit of the rule of non-recognition is that it allows aborigines to marry without the imposi-

98. FREEDOM OF RELIGION AND BELIEF, *supra* note 35, at 167.

99. See Australia Now, Australian Government, Department of Foreign Affairs and Trade, http://www.dfat.gov.au/facts/islam_in_australia.html (last visited Oct. 10, 2005).

100. SEBASTIAN POULTER, ETHNICITY, LAW AND HUMAN RIGHTS 383 (1998). See National Agenda for a Multicultural Australia, 1989 Report, Australian Government, Department of Immigration and Multicultural and Indigenous Affairs, http://www.immi.gov.au/multicultural/_inc/publications/agenda/agenda89/toc.htm.

101. POULTER, *supra* note 100, at 384.

102. *Id.*

103. *Id.* The Commission was asked to report on criminal law, family law, and contract law. *Id.*

104. See Patrick Parkinson, *Multiculturalism and the Regulation of Marital Status in Australia*, in FAMILIES ACROSS FRONTIERS 309, 311 (Nigel Lowe & Gillian Douglas eds., 1996). See also Patrick Parkinson, *Taking Multiculturalism Seriously: Marriage Law and the Rights of Minorities*, 16 SYDNEY L. REV. 473, 480 (1994) (discussing the Australian Law Reform Commission's choice that non-recognition would be the best means for respecting indigenous culture).

tion of the "western legal and cultural framework" and exempts them from the strictures of the laws of divorce, which have no aboriginal equivalent.¹⁰⁵ Moreover, the State is exempt from codifying aboriginal customs that may conflict with western legal norms and thus not conflict with the National Agenda's commitment to Australia's democratic norms.¹⁰⁶ Australia recognizes certain exceptions to the rule of non-recognition through government acts, which protect various interests, among them family interests including those of children, decedent's property, the ability to adopt, and spouses of government employees.¹⁰⁷

Patrick Parkinson, Professor of Law and specialist in family law at the University of Sydney, suggests that the rule of non-recognition be extended to all marriages performed by ethnic or religious communities.¹⁰⁸ Legal regulation of marriage should be kept at the minimum necessary to protect the human rights of individuals.¹⁰⁹ Principles intrinsic to the western legal tradition and recognized as human rights by the international community should not be compromised.¹¹⁰ In 1992, the Australian Law Reform Commission agreed with Professor Parkinson and recommended that Australian law should be more receptive to its multicultural society,¹¹¹ but the Commission has failed to implement its recommendations.¹¹²

On the subject of divorce, while the Commission was willing to recognize customary marriages, it was not willing to extend that recognition to divorce. Parkinson argues that while this stance was justified because of the public interest in allowing time for reconsideration and reconciliation, as well as an interest in the welfare of children, an attempt at compromise could have been reached.¹¹³ One such compromise would continue to require the requisite time of separation subject to consideration

105. Parkinson, *supra* note 104, at 480.

106. *Id.* See also POULTER, *supra* note 100, at 384.

107. See Parkinson, *supra* note 104, at 480 n.36.

108. *Id.* at 480–81.

109. *Id.* (discussing the treaties to which Australia is a party which govern the protection of individuals with regards to marriage including the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage and Article 23 of the International Covenant on Civil and Political Rights).

110. *Id.* at 484. For a comparison of the laws protecting individual rights in England, Australia, and the United States see PETER W. EDGE, *LEGAL RESPONSES TO RELIGIOUS DIFFERENCE* 75–108 (2002).

111. See *FREEDOM OF RELIGION AND BELIEF*, *supra* note 35, at 168.

112. See Parkinson, *supra* note 104, at 484. As of 1992, Australian family law applies to all residents including those in Australian territories in the Indian Ocean, which formerly applied Muslim personal law. *FREEDOM OF RELIGION AND BELIEF*, *supra* note 35, at 168.

113. See Parkinson, *supra* note 104, at 486–87.

of the welfare of the children but without the usual filing requirements. The government would ensure that these procedures would be open to men and women in order to guarantee that customs not in line with gender equality would not prevent a spouse from seeking a divorce on the basis of their gender. The government would allow parties of a customary divorce to seek a civil declaration of dissolution if they wish.¹¹⁴ Such an approach does not really seem, on its face, like much of a compromise. It seems to retain the government's requirements while only doing away with some filing requirements. The public's interest in the welfare of children and the rights of both men and women to dissolve a marriage seem to warrant the close governmental oversight here, and perhaps Parkinson's approach is mindful of that.

The Australian Commission, like the English Parliament and the New York legislature, also responded to the question of whether the civil law should require a party to grant a religious divorce before being granted a civil divorce. The Commission recommended that a court could use its power to postpone the finality of a divorce decree until the impediment to religious divorce had been removed unless a child would be harmed in the process.¹¹⁵ This stance took the concerns of minority groups seriously and Parkinson suggests that concerns about women being denied the right to divorce and remarry may have prompted this multicultural recommendation.¹¹⁶

In reflection, Parkinson questions whether a society deeply rooted in traditions of European law is willing to go beyond passing anti-discrimination laws or providing multilingual court interpreters as a means of implementing multiculturalism. He questions whether true multiculturalism is even possible without the willingness to consider ways to allow minority groups to utilize their own set of laws without compromising individual freedoms.¹¹⁷ This question is at the heart of the decision facing Canada in its consideration of the Canadian Society of Muslims' proposal.

114. *Id.* at 487.

115. *Id.*

116. *Id.* This recommendation mainly affects Jewish and Muslim divorces. Both Jewish and Muslim divorce law allows for the unilateral repudiation of a wife by her husband. Under Jewish law, a husband must give a written document called a *get* to his wife to enable her to remarry. Under Islamic law, a husband must pronounce a verbal declaration called *talaq* releasing his wife in order for her to remarry. See Judith Romney Wegner, *The Status of Women in Jewish and Islamic Marriage and Divorce Law*, 5 HARV. WOMEN'S L.J. 1, 16 (1982).

117. See Parkinson, *supra* note 104, at 505.

3. The United States—The Melting Pot Goes Multicultural

The United States, a nation of immigrants, has maintained a fiercely uniform, if not secular, family law,¹¹⁸ traditionally allowing little room for cultural accommodation. In the past forty years, however, as immigration trends have shifted away from Europe and expanded to include more immigrants from Asia, Africa, and South America, the needs of these immigrants have forced the American legal system, as well as society in general, to find practical ways of accommodating their needs.¹¹⁹ While the challenges of developing a multicultural family law remain, there is evidence that courts are beginning to take into account the needs

118. However, the roots of American family law, particularly those laws involving marriage, are heavily influenced by Christian tradition. Estin, *supra* note 55, at 542–43. An alternative to the extreme separation, or rather the imposed secularist approach of religious freedom in states such as the United Kingdom and United States is the “millet system” that operated in the Ottoman Empire. See KYMLICKA, *supra* note 1, at 156. The millet system allowed Muslims, Christians, and Jews the ability to self-govern, impose religious laws on members of their respective communities, establish religious courts, and subdivide for ethnic or linguistic convenience. *Id.* The Empire recognized and enforced individual groups’ decisions and rules on matters of family law but also strictly regulated non-Muslim communities’ interactions with Muslims. These restrictions included a rule against proselytizing for non-Muslims, a rule requiring licenses for building churches, and a rule requiring non-Muslims to pay special taxes. The disadvantage of this system, because of its lack of recognition for individual rights, was its inability to allow for or protect dissent within each religious community. *Id.* at 157. The system allowed each group to suppress individual dissent and define the terms of membership as it saw fit which could severely impact an individual’s civil status. In the mid-eighteenth century, the millets lost much of their self-governing authority when the Ottomans began to prefer a more unified citizenship. *Id.* at 183. Israel, a Jewish and democratic state, with a diverse religious population both within its Jewish population and among its various minority groups, employs a modified version of the millet system. This system delegates many personal status issues to religious authorities. A compromise reached between secular and religious Jews during the founding of the State of Israel delegated the regulation of personal status issues to the orthodox rabbinate. Today, Israeli Jews seeking to marry under the Reform, Conservative, or Reconstructionist streams of Judaism or civilly find themselves unable to gain official state recognition of their marriages because the orthodox rabbinate does not recognize these marriages. Jews wishing to marry outside of the orthodox tradition must marry outside of Israel. See Michael Corinaldi, *Protecting Minority Cultures and Religions in Matters of Personal Status both within State Boundaries and beyond State Frontiers—the Israeli System*, in *FAMILIES ACROSS FRONTIERS* 385–94 (Nigel Lowe & Gillian Douglas eds., 1996) (describing the legal status of religion in Israel particularly the personal status of internal Jewish minorities). See also Melanie D. Reed, *Western Democracy and Islamic Tradition: The Application of Shari’a in a Modern World*, 19 AM. U. INT’L L. REV. 485, 497–503 (2004) (discussing the jurisdiction of religious courts in Israel).

119. See generally Estin, *supra* note 55.

of its citizens.¹²⁰ In the legislatures, New York has taken the lead in passing an innovative yet controversial law,¹²¹ predominantly accommodating the needs of its Jewish residents to obtain a divorce, but also able to serve the needs of Muslims and those of other faiths.¹²² Additionally, as in England, the Muslim community has used creativity and pragmatism to develop its own mechanisms for balancing religious and secular law.¹²³

The New York Get Law, as it is known because of its intent to remedy the intentional withholding of Jewish religious divorces by husbands,¹²⁴ accommodates religious tradition while also protecting individual liberties. Jewish law requires a husband to serve a document, the *get*, to his wife in order for the marriage to be dissolved.¹²⁵ With a civil decree and no *get*, a Jewish woman faces a limping marriage, unrecognized by the

120. One regularly cited case is *Odatalla v. Odatalla*, 810 A.2d 93 (N.J. Super. Ct. Ch. Div. 2002) where a Muslim marriage contract was treated like any other contract and the court required the husband to pay the wife the dowry owed her. See discussion of case in Estin, *supra* note 55, at 573 and Asifa Quraishi & Najeeba Syeed-Miller, *No Altars: A Survey of Islamic Family Law in the United States*, in WOMEN'S RIGHTS & ISLAMIC FAMILY LAW 201 (Lynn Welchman ed., 2004). In *Habibi-Fahnrich v. Fahnrich*, 1995 WL 507388 (N.Y. Sup. Ct. 1995), the court acknowledged the existence of Muslim marriage contract but refused to enforce it because of vagueness not because it was a religious agreement. *Id.* at 203.

121. N.Y. DOM. REL. LAW § 253 (McKinney 1999). It has been argued that this law is unconstitutional because it violates the protections of the First Amendment to the U.S. Constitution, and while it has been found unconstitutional as applied in a New York trial court, *see Chambers v. Chambers*, 471 N.Y.S.2d 958 (N.Y. Sup. Ct. 1983), it has not yet been found to violate the U.S. Constitution. While it is beyond the scope of this Note to consider the constitutional questions surrounding this legislation, this Note offers the legislation as a practical compromise between religious and civil law. For an analysis of the First Amendment issues implicated by this legislation see Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781 (arguing that the New York Get Law is constitutional); *cf.* Patti A. Scott, Comment, *New York Divorce Law and the Religion Clauses: An Unconstitutional Exorcism of the Jewish Get Laws*, 6 SETON HALL CONST. L.J. 1117 (1996) (arguing that the New York Get Law is unconstitutional).

122. Because of the similarities between Jewish and Islamic divorce, particularly between the *get* and *talaq*, the New York Get Law is easily applicable to protect Muslims. *See* Wegner, *supra* note 116; Bernard Berkovits, *Get and Talaq in English Law: Reflections on Law and Policy* 119–25 in ISLAMIC FAMILY LAW (Chibli Mallat & Jane Connors eds., 1990).

123. *See generally* Quraishi & Syeed-Miller, *supra* note 120, at 177–229; YVONNE YAZBECK HADDAD & ADAIR T. LUMMIS, ISLAMIC VALUES IN THE UNITED STATES (1987); EARLE H. WAUGH, BAHÁ ABU-LABAN & REGULA B. QURESHI, THE MUSLIM COMMUNITY IN NORTH AMERICA (1983).

124. *See* N.Y. DOM. REL. LAW § 253 (McKinney 1999).

125. *See* ISAAC KLEIN, A GUIDE TO JEWISH RELIGIOUS PRACTICE (2d ed. 1992).

Jewish community.¹²⁶ The New York Get Law requires a party married by any clergy seeking a divorce to verify that no barriers to the defendant's remarriage exist "to the best of his or her knowledge" by the time final judgment is entered by the court.¹²⁷ The law does not involve the clergy in the divorce proceedings. Rather, it is the plaintiff who attests that a barrier to remarriage does not exist.¹²⁸ The verification is made by a sworn statement, and a party knowingly making a false statement can be prosecuted under the penal law.¹²⁹ Under Jewish law, a *get* must be given voluntarily and a *get* given under coercion or duress will be deemed inadequate. To oblige this religious requirement, the Get Law defines a "barrier to remarriage" as only those things that can be rectified voluntarily by the spouse.¹³⁰ A drawback of the legislation is that it is only the plaintiff who must swear there is no barrier to the defendant's remarriage.¹³¹ In practical terms, the law works as it should when the husband attempts to extort the wife by seeking a civil divorce and refuses to deliver the *get*, but does not work when the wife seeks a civil divorce and the husband refuses to deliver the *get*. However, this is something that could be remedied through further amendments.¹³²

Despite the controversial nature of the New York Get Law, it serves as an apt illustration of a compromise between competing religious and civil interests. The law recognizes the indispensability of religious law for some persons while preserving the state's interest in marriage and the ability of adults to marry freely. It acknowledges the centrality of matrimonial issues to religious life and the tension facing religious individuals when trying to harmonize religious and secular law.¹³³ At the same time,

126. For a brief description of the *get* procedure including the historical basis see Berkovits, *supra* note 122, at 119–25. For additional brief descriptions see also Wegner, *supra* note 116; Michael Freeman, *Law, Religion and the State*, in *FAMILIES ACROSS FRONTIERS* 361 (Nigel Lowe & Gillian Douglas eds., 1996).

127. N.Y. DOM. REL. LAW § 253 (McKinney 1999). Because the law does not specifically refer to any religious group, it has the ability to include Islamic divorce as well as any other religious divorces. *Id.*

128. See Greenawalt, *supra* note 121, at 799 (discussing the constitutional implications of entanglement when religious officials become involved with a legislative scheme in the context of kosher laws).

129. N.Y. DOM. REL. LAW § 253 (McKinney 1999).

130. *Id.* This greatly assisted in helping the law be accepted by the orthodox Jewish Community. *Id.*

131. *Id.*

132. Amendments made thus far to the law include a 1984 amendment eliminating the requirement that a spouse consult with clergy for an opinion on whether a "barrier to remarriage" existed. *Id.*

133. See SHACHAR, *supra* note 4, at 78. Such laws as the New York Get Law actually have "expanded the power of state law over minority cultures by creating a formal link

it provides a civil protection for women who may find themselves at the mercy of religious law when a husband refuses to serve a *get* upon his wife. It both protects the free exercise of religion while protecting against the abuse of a religious law that can infringe fundamental individual liberties.

In addition to encouraging courts to take into account religious law and practice, the American Muslim community¹³⁴ has used its initiative to incorporate and balance its religious law with the secular laws of the United States.¹³⁵ Some Muslims have encouraged the use of expanded marriage contracts to include certain religious obligations.¹³⁶ Like Muslims in England and Canada, some American Muslims have considered the idea of establishing alternative dispute resolution fora for Muslims.¹³⁷ The initiatives in the United States, however, have considered utilizing a more egalitarian approach than has been implemented in England. In the United States, the emphasis might focus not so much on the arbitrator's decision, but rather on conflict resolution through greater involvement of

between the civil proceedings of divorce and the removal of all religious or customary barriers to remarriage" but such laws are "nevertheless . . . important because [they provide] formal recognition of certain aspects of minority communities' family law traditions." *Id.* at 77–78.

134. The American Muslim community has been estimated to be between 1–7 million and its numbers are difficult to verify. *See, e.g.*, EGON MAYER, ET AL., CITY UNIVERSITY OF NEW YORK, AMERICAN RELIGIOUS IDENTIFICATION SURVEY 13 (2001), http://www.gc.cuny.edu/faculty/research_studies/aris.pdf (last visited Oct. 9, 2005) (estimating 1.1 million American Muslims); TOM W. SMITH, AMERICAN JEWISH COMMITTEE, ESTIMATING THE MUSLIM POPULATION IN THE UNITED STATES (2001), <http://www.ajc.org/site/apps/nl/content3.asp?c=ijITI2PHKoG&b=846733&ct=1044159> (last visited Oct. 9, 2005) (estimating 1.8 million American Muslims); IHSAN BAGBY, ET AL., COUNCIL ON AMERICAN-ISLAMIC RELATIONS, THE MOSQUE IN AMERICA: A NATIONAL PORTRAIT (2001), http://www.cairnet.org/mosquereport/Masjid_Study_Project_2000_Report.pdf (last visited Oct. 9, 2005) (estimating 6–7 million American Muslims). American mosques are very ethnically diverse including Americans of South Asian, African, and Arab ancestry. Ninety-three percent of American mosques include a broad range of ethnic diversity. *Id.*

135. *See generally* Quraishi & Syeed-Miller, *supra* note 120, at 176–229.

136. Among them is lawyer, professor, and founder of the civil rights advocacy group, Karamah: Muslim Women Lawyers for Human Rights, Azizah Al-Hibri, who advocates the use of marriage contracts and asserts that principles of Muslim marriage law have been misinterpreted and actually serve to promote and protect women's rights. *Id.* at 184. *See generally* <http://www.karamah.org> (last visited Oct. 9, 2005) (describing the work and initiatives of Azizah Al-Hibri and Karamah).

137. Quraishi & Syeed-Miller, *supra* note 120, at 214–15. The alternative dispute resolution forum, the *beit din*, utilized by the orthodox Jewish community, has influenced these initiatives. *Id.* at 215.

the parties and community members.¹³⁸ In addition, some states have enacted laws that include clergy on lists of available mediators and family counselors.¹³⁹ Despite recent setbacks, most notably through assaults on their communities post-September 11th, 2001,¹⁴⁰ the experience of Muslims in America has been positive and has included, quite vocally, the voices of women along with men.¹⁴¹ This community has and will continue to use the tools of democratic society to organize and move forward, unhindered by the narrow, male-dominated interpretations of Islam that prevailed in the past.¹⁴²

III. THE MEANING OF RELIGIOUS FREEDOM IN CANADA

In 1970, Canada's multiculturalism policy shifted and it began favoring 'polyethnicity'¹⁴³ over assimilation for immigrants.¹⁴⁴ However, it was not until 1982 that the Charter of Rights and Freedoms not only codified fundamental freedoms but also adopted a rule that required the newly drafted Charter to be interpreted in accordance with the multicultural heritage of Canadians.¹⁴⁵ Since the Charter's adoption, the Supreme Court of Canada has had a few occasions to consider the meaning of freedom of religion as laid out in the Charter.¹⁴⁶

138. *Id.* Quraishi and Syeed-Miller suggest that the existence of established arbiters might be welcomed by some courts and cite a case from California in which the parties agreed to consult two religious scholars who made a recommendation that was then used by the judge to allocate the spouses' property. *Id.*

139. *Id.*

140. See, e.g., Moni Basu, *In Troubled Times, U.S. Muslims Get Political*, ATLANTA J. CONST., July 24, 2004, at A1; Raksha Varma, *ACLU Has Hotline for Arabs, Muslims Visited by FBI*, CHICAGO SUN-TIMES, Aug. 13, 2004, at 26.

141. Quraishi & Syeed-Miller, *supra* note 120, at 217.

142. See *id.*

143. See KYMLICKA, *supra* note 1, at 17. Kymlicka defines "polyethnic rights" as "group-specific measures . . . intended to help ethnic groups and religious minorities express their cultural particularity and pride without it hampering their success in the economic and political institutions of the dominant society." *Id.* at 31.

144. A policy of polyethnicity prefers integration over self-government. *Id.* at 31.

145. Canadian Charter of Rights and Freedoms, Constitution Act, 1982, pt. I, § 27, as reprinted in R.S.C., No. 44, sched. B, Canada Act 1982 (U.K.), ch. 11, Pt. I (Appendix II 1985), available at <http://laws.justice.gc.ca/en/charter/index.html> [hereinafter *Charter*].

146. For a critique of the Canadian Supreme Court's interpretation of religious freedom, see John Von Heyking, *The Harmonization of Heaven and Earth? Religion, Politics, and Law in Canada*, 33 U.B.C. L. Rev. 663-97 (2000) (arguing that the Court has confused religious pluralism with secularism).

The Canadian Charter of Rights and Freedoms recognizes “freedom of conscience and religion” as among the fundamental freedoms,¹⁴⁷ but even these fundamental freedoms are subject to reasonable limits.¹⁴⁸ Unlike the First Amendment of the United States Constitution, the Canadian Charter does not include an establishment clause. The Charter provides for free exercise for individuals without prohibiting the government’s actions.¹⁴⁹ Thus, the Charter does not prohibit selective funding of religious schools.¹⁵⁰ Additionally, the Charter has other provisions to be considered in conjunction with freedom of religion. These include the preamble’s reference to the supremacy of God¹⁵¹ and Section 27, which requires the Charter to be interpreted in a multicultural manner.¹⁵²

The Supreme Court of Canada interpreted the Charter’s meaning of religious freedom in *R. v. Big M Drug Mart Ltd.*, a case about a law that enforced a Christian day of rest.¹⁵³ In declaring the Lord’s Day Act unconstitutional, the Court found that the coercive law was antithetical to

147. *Charter*, pt. I, § 2 (“2. Fundamental Freedoms. Everyone has the following fundamental freedoms: a) freedom of conscience and religion; b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; c) freedom of peaceful assembly; and d) freedom of association.”).

148. *Id.* pt. I, § 1 (“1. Rights and freedoms in Canada. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”). See also Paul Horwitz, *The Source and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond*, 54 U.T. FAC. L. REV. 1 (1996) (arguing that religious freedom allows for the practice of essential religious practices and those practices considered unessential may not be protected under the Charter).

149. See Robert A. Sedler, *The Constitutional Protection of Freedom of Religion, Expression, and Association in Canada and the United States: A Comparative Analysis*, 20 CASE W. RES. J. INT’L L. 577, 582–83 (1988).

150. *Id.* at 583. See also *R. v. Big M Drug Mart Ltd.*, [1984] 1 S.C.R. 295, 303 (“Section 29 preserves the rights of denominational schools guaranteed under s. 93 of the Constitution Act, 1867: 29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under this Constitution of Canada in respect of denominational, separate or dissentient schools.”). See also Horwitz, *supra* note 148 (discussing the lack of a “firm wall” between church and state in Canada).

151. *Charter*, pt. I, pmbl.

152. *Id.* pt. I, § 27. See also *Big M Drug Mart*, [1984] 1 S.C.R. at 302 (“Section 27 makes the multicultural heritage of Canada an interpretive guideline for the Charter.”). But see JAMES TULLY, *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY* 7 (1995) (arguing that the adoption of the Canadian Charter of Rights and Freedoms has actually encouraged discord and that so-called “culture-blind liberal constitutionalism” is not the solution for meeting the needs of cultural diversity).

153. *Big M Drug Mart*, [1984] 1 S.C.R. 295. In this case, Big M was charged with violating the Lord’s Day Act. The Lord’s Day Act prohibited work on Sundays and punished a violation as a criminal offense. *Id.*

the demands of a free society.¹⁵⁴ The Court listed the principles essential to freedom of religion, including the rights to entertain, declare, and manifest religious beliefs.¹⁵⁵ These freedoms are limited by the state's interest in protecting the public, including the guarantee that one person's freedom will not infringe on another's.¹⁵⁶ Besides creating an unwelcoming environment for non-Christians and infringing upon the right to engage in otherwise lawful activity, the Court recognized the inconsistency of the Lord's Day Act with Section 27 of the Charter¹⁵⁷ by "[compelling a] universal observance of the day of rest preferred by one religion."¹⁵⁸ In response to the Government's argument that the Charter, unlike the U.S. Constitution, does not have an anti-establishment principle, the Court found that the guarantee of Section 2(a) does not depend upon such a principle and required that laws alleged to interfere with the freedom of religion would be judged on a case-by-case basis.¹⁵⁹

IV. COURT REFORM IN CANADA AND THE POSSIBILITY OF RELIGIOUS ALTERNATIVE DISPUTE RESOLUTION

A. Court Reform Recommendations & Alternative Dispute Resolution

In 1987, the Ontario Courts Inquiry, presided over by the Honorable Thomas G. Zuber, sought to recommend changes to the civil court sys-

154. *Id.* "Freedom can primarily be characterized by the absence of coercion or constraint." *Id.* at 336.

155. *Id.*

156. *Id.* at 336-37.

157. Mordechai Wasserman describes the rights and freedoms in the Charter as negative rights, which place limits on government, and quotes Justice L'Heureux-Dubé in *Young v. Young*, who wrote that the purpose of the Charter is "to provide a measure of protection from the coercive power of the state and a mechanism of review to persons who find themselves unjustly burdened or affected by the actions of government." Wasserman says that section 27 "is an interpretive section that gives direction to courts for interpreting the rights and freedoms in the Charter, and does not mandate anything about the role of the state." Mordechai Wasserman, *Review of J. Syrtash, Religion and Culture in Canadian Family Law*, 12 CAN. J. FAM. L. 215 (1994) (reviewing JOHN TIBOR SYRTASH, *RELIGION AND CULTURE IN CANADIAN FAMILY LAW* (1992)).

158. *Big M Drug Mart*, [1984] 1 S.C.R. at 337.

159. *Id.* at 341. *See also* Sedler, *supra* note 149, at 582-83 (arguing that the expansive meaning given freedom of religion in this case shows that the Canadian government must remain neutral toward religion). Sedler also discusses *R. v. Edwards and Books and Art, Ltd.*, [1986] 2 S.C.R. 744-47, where a Sunday closing law was upheld because of its secular purpose, similar to the U.S. Supreme Court's decision in *Braunfeld v. Brown*, 366 U.S. 599 (1961). *Id.* at 587.

tem in Ontario due to the increasing workload the system faced.¹⁶⁰ The Zuber Commission, as the Inquiry came to be known, was the precursor to the Ontario Civil Justice Review. Recommendations of this commission included establishing a permanent and separate family court in Ontario and incorporating more ADR into the overburdened court system.¹⁶¹ With respect to family law cases, it suggested that the court give spouses the opportunity to request mediation at the very beginning of the court dispute.¹⁶² It did not mention the incorporation of Muslim personal law.

In April 1994, the then Chief Justice of the Ontario Court of Justice and the then Attorney General of Ontario established a commission called the Civil Justice Review to once again review the problems facing the civil justice system in Ontario.¹⁶³ The Civil Justice Review's First Report described the Ontario justice system as "an administrative monster that muddles along at best"¹⁶⁴ and one in which the public is demanding greater participation.¹⁶⁵ One of the commission's recommendations sought to create a vision of the courts as a "dispute resolution centre" utilizing a multi-door approach.¹⁶⁶ The multi-door approach would allow disputants to choose from a variety of dispute resolution mechanisms that would be geared toward their particular circumstances while

160. HON. T.G. ZUBER, REPORT OF THE ONTARIO COURTS INQUIRY 1-7 (1987) [hereinafter ZUBER COMMISSION]. The Commission mandated:

[T]he Honourable Thomas George Zuber . . . be authorized to inquire into and requested to report by April 1, 1987 on the jurisdiction, structure, organization, sittings, case scheduling and workload of all of the courts of Ontario, and any other matter affecting the accessibility of and the service to the public provided by the courts of Ontario, and to make recommendations to the Attorney General concerning the provision of a simpler, more convenient more expeditious and less costly system of courts for the benefit of the people of Ontario.

Id. at 2.

161. *Id.* § 12.2, Summary of Recommendations.

162. *Id.* at 289.

163. See CIVIL JUSTICE REVIEW, FIRST REPORT 3 (March 1995) [hereinafter FIRST REPORT]. The mandate of the Civil Justice Review is "to develop an overall strategy for the civil justice system in an effort to provide a speedier, more streamlined and more efficient structure which will maximize the utilization of public resources allocated to civil justice." *Id.*

164. *Id.* at 99.

165. *Id.* at 102.

166. *Id.* at 7. Similarly, in the realm of family law, the Children of Separation & Divorce Center (COSD), a non-profit organization in Maryland, has referred to the approach of their dispute resolution center as a "cafeteria-style" approach including access to services such as case evaluation, community referral, counseling, child access planning, expert consultation, property and support mediation, and arbitration. Patricia Gearity, *ADR and Collaborative Lawyering in Family Law*, 35 MD. B.J., June 2002, at 2, 6.

assuring that the mechanisms would remain "impartial and fair" and resolve disputes in a binding manner.¹⁶⁷ The commission emphasized that although ADR techniques present alternatives to disputants, they are not intended to replace the court system.¹⁶⁸ In reviewing the types of ADR, binding arbitration is suggested among the possible alternatives.¹⁶⁹ The commission recommended that access to ADR be court-connected¹⁷⁰ because the state has an obligation to make dispute resolution available to the public and because ADR fits within the commission's goal of more effective caseload management.¹⁷¹ A court-connected ADR pilot project was launched in Ontario in October 1994.¹⁷²

After the implementation of the ADR pilot project, the Supplementary Report of the Civil Justice Review reaffirmed its commitment to court-connected ADR.¹⁷³ One evaluation of the pilot project suggested that the positive responses to the project were a result of the project's court-connectedness, ensuring that supervision by the Court enhances ADR's credibility in the eyes of the public.¹⁷⁴ In the area of family law, the

167. FIRST REPORT, *supra* note 163, at 8.

168. *Id.* at 210.

169. *Id.* at 213–14. The Law Society of Upper Canada published the *Glossary of Dispute Resolution Processes* that sets forth definitions of various ADR terms. The Glossary defines "arbitration" as:

Any of the forms of dispute resolution involving a mutually acceptable, neutral third party making a decision on the merits of the case, after an informal hearing which usually includes the presentation of evidence and oral argument. The process has four main variations (creating numerous permutations): binding or non-binding; voluntary or compulsory; private, statute-authorized, court annexed (alternatively termed court-connected); one arbitrator or a panel.

THE LAW SOCIETY OF UPPER CANADA, GLOSSARY OF DISPUTE RESOLUTION PROCESSES (1992), *reprinted in* DISPUTE RESOLUTION 767 (Julie Macfarlane ed., 2d ed. 2003). In its definition of "binding arbitration" the Glossary notes that a decision is subject to judicial review only in limited circumstances. The Glossary defines decisions rendered through 'mandatory court-annexed arbitration' as non-binding if any party disputes them and that unsatisfied parties retain the right to proceed to trial with some cost penalty attached. *Id.* Under Mumtaz Ali's proposed plan, parties would not retain this right. *See Review of the Ontario Civil Justice System*, *supra* note 44, at 39–41.

170. *See* FIRST REPORT, *supra* note 163, at 214. "Court-connected" meaning that "ADR facilities should be available to the public as part of the 'court' system." *Id.*

171. *Id.* at 215 ("Caseflow management" is "a case-processing mechanism which manages the time and events of a lawsuit as it passes through the justice system."). A court-connected ADR pilot project was launched in Ontario in October 1994. The pilot project excluded family law matters. *Id.* at 216.

172. *Id.* at 216.

173. *See* CIVIL JUSTICE REVIEW, SUPPLEMENTAL AND FINAL REPORT 50 (Nov. 1996) [hereinafter SUPPLEMENTAL AND FINAL REPORT].

174. *Id.* at 61–62.

commission recognized that family disputes might be ripe for the use of ADR, but also recognized that in some circumstances family disputes could create an imbalance in the process and preclude those particular disputes from utilizing ADR.¹⁷⁵ Considering the potential for such imbalances, the commission recommended two modified opportunities for ADR in the context of family law.¹⁷⁶ The first involved the creation of centers to educate the public about court proceedings and ADR resources available in the area of family law.¹⁷⁷ The second involved family law case conferences held before a judge shortly after the filing of a claim.¹⁷⁸ These conferences would establish a strategy for case management and consider whether mediation, not arbitration, might help resolve the dispute. The judge would play a greater supervisory role because of the “heightened importance” of the legal rights involved in family disputes and the potential impact of decisions on children.¹⁷⁹

B. ADR and Family Law: Practical Concerns

The elevated concern that the Civil Justice Review had for the application of ADR to family disputes is not surprising considering that family law serves several important social functions¹⁸⁰ and that the concerns expressed by the Civil Justice Review regarding the gravity of family disputes has been considered by practitioners and scholars of family law alike. While both practitioners and scholars have concerns about the impact of ADR on family disputes, in particular those involving custody and domestic violence, most do not rule out the use of ADR in family disputes. Many recognize that the traditional adversarial model of litigation may actually do more harm than good to the children involved in

175. *Id.* at 77. These situations include cases of “acrimony between the parties, and the presence of spousal abuse problems and power imbalances.” *Id.*

176. *Id.* at 77–78.

177. *Id.* at 77.

178. *Id.* at 78.

179. *Id.*

180. See generally Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992). Professor Schneider sees Family Law as serving five main functions in society: the protective function, the facilitative function, the arbitral function, the expressive function, and the channeling function. The channeling function “creates or (more often) supports social institutions which are thought to serve desirable ends.” *Id.* at 498. Examples given by Schneider are marriage and parenthood. The channeling function serves the other functions of family law and while it may have both positive and negative effects on society, Schneider concludes that it will not disappear because society will continue to create, depend upon, and improve social institutions. *Id.*

these disputes.¹⁸¹ A trend to establish a more collaborative model of dealing with family disputes that focuses on settlement rather than litigation has been recognized by practitioners in both Canada and the United States.¹⁸² Proponents of the use of ADR for resolving family disputes do not necessarily advocate, however, that ADR for family disputes be relegated to the private sphere without the scrutiny of the public system.¹⁸³

While family law deals with issues of heightened importance like custody and domestic violence, it also serves important social functions for various groups. For minority groups, such as Muslims living in Canada, family law, governing many personal status issues, plays a key role in determining identity.¹⁸⁴ It is through family law that one's membership in the community is decided.¹⁸⁵ While determining membership is directly related to a group's survival, public policy concerns, such as women's equality, challenge the degree to which secular states are willing to delegate such matters.¹⁸⁶ In the development of collective identities, while women have on the one hand been revered, their reverence has also given way to "gender-biased norms and practices that often subordinate women."¹⁸⁷ Accommodation of cultural differences in the realm of family law can help protect the survival of minority communities, but it can also reinforce discriminatory cultural practices that impact those minorities within the minority, such as women.¹⁸⁸ Viable ways to incorporate

181. See generally Eileen Pruett & Cynthia Savage, *Statewide Initiatives to Encourage Alternative Dispute Resolution and Enhance Collaborative Approaches to Resolving Family Issues*, 42 FAM. CT. REV. 232 (2004); Gearity, *supra* note 166; Gregory Firestone & Janet Weinstein, *In the Best Interests of Children: A Proposal to Transform the Adversarial System*, 42 FAM. CT. REV. 203 (2004).

182. See Julien D. Payne, Professor, Presentation to students in the Faculty of Law, University of Saskatchewan, *Family Conflict Management and Family Dispute Resolution on Marriage Breakdown and Divorce: Diverse Options* (Feb. 10, 1997), available at <http://www.quicklaw.com>.

183. See, e.g., Alia Hogben, *Should Ontario Allow Sharia Law?*, TORONTO STAR, June 1, 2004, at A19 (arguing that family matters should be excluded from the Ontario Arbitration Act to ensure the safeguards of public scrutiny).

184. See SHACHAR, *supra* note 4, at 45–46 (2001). Shachar calls this the "gatekeeping function" of family law. *Id.* at 46.

185. See, e.g., *Sandra Lovelace v. Canada*, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981).

186. SHACHAR, *supra* note 4, at 46.

187. *Id.* at 50. The same traditions that may determine cultural membership may be the same traditions which subordinate women. *Id.* For example, Muslim women may not marry outside of the faith whereas Muslim men are permitted to marry Jews and Christians, the so-called People of the Book. ESPOSITO & DELONG-BAS, *supra* note 15, at 19.

188. Canadian Muslim women account for just under half of the total Canadian Muslim population. DAOOD HAMDANI, CANADIAN COUNCIL OF MUSLIM WOMEN, MUSLIM WOMEN: BEYOND THE PERCEPTIONS iii (2004), available at <http://www.ccmw.com/publi>

ADR into family disputes must involve protections for vulnerable individuals and at the same time protect the rights of minority groups to preserve their identity.

C. The Plan to Establish Muslim Arbitration Tribunals

Like his predecessor Dr. Baig, Mumtaz Ali took the occasion of the Civil Justice Review as a chance to express the concerns of his organization and made recommendations for the implementation of Muslim family law. He submitted a brief to the Civil Justice Review discussing the issues raised in *Oh! Canada! Whose Land? Whose Dream?* and making recommendations for how some of the ideas in the 1991 report could be incorporated into the Ontario civil justice system.¹⁸⁹ The central and most concrete recommendation made by Mumtaz Ali in this brief was to create a “Court Annexed Arbitration Board System” to settle disputes using Muslim family law.¹⁹⁰ Mumtaz Ali made several recommendations for implementing such a system based on the Zuber Report.¹⁹¹ The brief suggests the Arbitration Board System be established through the ADR pilot project.¹⁹² The roster of ADR service providers would include private arbitrators and, in particular, include specialists in Muslim family law who would preside over Muslim family disputes.¹⁹³ Mumtaz Ali’s

cations/Reports/Beyond_the_Perceptions.pdf. See SHACHAR, *supra* note 4, at 62. See also Samuel K. Murumba, *Cross-Cultural Dimensions of Human Rights in the Twenty-First Century*, in LEGAL VISIONS OF THE 21st CENTURY: ESSAYS IN HONOUR OF JUDGE CHRISTOPHER WEERAMANTRY (A. Anghie & G. Sturges eds., 1998). Professor Murumba points out some of the weaknesses of communitarianism:

Indeed, with a little modification, the communitarian criticism of individualism can be easily re-deployed against communitarianism itself. It is possible to show that individuals are not wholly “situated,” that community, culture and society cannot capture the uniqueness of the human person, without remainder; it is equally possible to show that the communitarian conceptions of culture and society are themselves parasitic upon the very kind of human agency that communitarianism question-beggingly locates within them This much, however, we can say: these rival images of individuals and society *both* compete with, *and* cannot live without, each other.

Id. at 229.

189. *Review of the Ontario Civil Justice System*, *supra* note 44.

190. *Id.* at 37.

191. *Id.* at 37–38.

192. *Id.* at 38.

193. *Id.* Because there are several schools of Islamic law, Mumtaz Ali promises that a variety of representatives would represent all the major schools and would apply the school of thought subscribed to by the parties. Syed Mumtaz Ali, *An Update on the Islamic Institute of Civil Justice*, (Aug. 2004), <http://muslim-canada.org/news04.html>.

plans would no longer require parties to submit a statement of defense and the parties would no longer hold a settlement conference before proceeding to arbitration.¹⁹⁴ An arbitration award under this system would be filed with the Court and deemed an appealable court judgment. Parties would not have the option of proceeding to trial because the award would be final and binding.¹⁹⁵ An independent adjudicative mechanism would be established, modeled after the Trinidad and Tobago Muslim Marriage and Divorce Act,¹⁹⁶ to issue divorce decrees and to determine matters of child support and custody.¹⁹⁷ The Muslim Arbitration Boards would only have jurisdiction over those who registered with the Boards.¹⁹⁸

Mumtaz Ali emphasizes the need for arbitration rather than mediation.¹⁹⁹ He gives two reasons for this preference. First, utilizing arbitration would allow the Muslim community to decide family law matters using Muslim family law, and arbitration decisions would be final with-

194. *Review of the Ontario Civil Justice System*, *supra* note 44, at 39–41. Mumtaz Ali argues that a statement of defense is not necessary in cases proceeding to arbitration and can even be detrimental because it causes even more acrimony between the parties. *Id.*

195. *Id.* at 39–41.

196. The Trinidad & Tobago Muslim Marriage and Divorce Act delegates the regulation of Muslim marriages and divorces to the Muslim community through three recognized Islamic organizations. It establishes an independent Council governed by a Muslim Registrar General of Trinidad & Tobago and local Muslim Registrars. The Act provides the requisites for a valid Muslim marriage but leaves the interpretation of whether a particular couple meets the requisites entirely to the Council. Muslims choose to be governed by the Act by marrying according to its regulations. Muslims are not bound by the Act if they choose not to marry according to its rules. While divorce is delegated to the recognized Muslim community through this Act, the civil court maintains jurisdiction over custody and maintenance. There is no evident opt-out provision for those who no longer want to be bound by the Act. Muslim Marriage and Divorce Act, 1961, Ch. 45:02 (Trinidad & Tobago). For a discussion of a similar statute, the Dissolution of Muslim Marriages Act of 1939, still applicable in India, Pakistan, and Bangladesh, and the difficulties presented by it, see Menski, *supra* note 84.

197. *Review of the Ontario Civil Justice System*, *supra* note 44, at 42–43. For a critique of “feminist-apologist” understandings of and debates about Islamic law, of which Mumtaz Ali is arguably among, with particular discussion of Muslim women’s rights in marriage and divorce, see Kecia Ali, *Progressive Muslims and Islamic Jurisprudence: The Necessity for Critical Engagement with Marriage and Divorce Law*, in *PROGRESSIVE MUSLIMS ON JUSTICE, GENDER, AND PLURALISM* 163–89 (Omar Safi ed., 2003).

198. *Review of the Ontario Civil Justice System*, *supra* note 44, at App. B1; Michael McAteer, *Muslims Seek Jurisdiction Over Family Law*, *TORONTO STAR*, May 30, 1991, at A2.

199. *Id.* at 41. See also JOHN TIBOR SYRTASH, *RELIGION AND CULTURE IN CANADIAN FAMILY LAW* 98 (arguing advantages of religious arbitration tribunals include their ability to keep disputes “within the family” and therefore not unnecessarily expose members of the minority to public embarrassment, their ability to encourage settlement, and their ability to save costs).

out requiring “formal court approval.” Second, arbitration awards would be filed with the court and “would enable one to use the judicial/court administrative machinery for enforcement and implementation.”²⁰⁰ Since that submission, Mumtaz Ali has taken an alternate route towards gaining recognition for Muslim family law by establishing a private Muslim arbitration tribunal called the Islamic Institute of Civil Justice, or *Darul-Qada*, under the auspices of the Ontario Arbitration Act.²⁰¹ Despite the difference in terminology, from court-connected to private, these tribunals retain the capacity to issue judgments enforceable by the civil courts since they are governed by the Arbitration Act.²⁰²

The *Darul-Qada* has attracted much attention and criticism both from within and without the Muslim community.²⁰³ In response to the growing controversy, Attorney General Michael Bryant and Women’s Issues Minister Sandra Pupatello appointed Marion Boyd to review the effects of religious arbitration tribunals on Canadian society, in particular women, and make recommendations for the future.²⁰⁴ On December 20, 2004, Marion Boyd delivered her report to the Attorney General.²⁰⁵ This report recommended that family law remain within the Arbitration Act and continue to allow parties to consent to the use of religious law.²⁰⁶ However, the report recommended several safeguards be implemented to

200. See *Review of the Ontario Civil Justice System*, *supra* note 44, at 3. See also Syed Mumtaz Ali, *The Good Muslim/Bad Muslim Puzzle*, The Canadian Society of Muslims, June 14, 2004, <http://muslim-canada.org/goodbad.html> (last visited Aug. 31, 2005) (arguing that while Muslim arbitration tribunals are technically voluntary, Muslims are obligated to submit to this religious authority because they are required to live according to Islamic law).

201. See *Darul Qada*, *supra* note 8.

202. *Id.* (pointing out the finality of arbitration awards in almost all cases with the assistance of the Ontario justice system).

203. See, e.g., Marianne Meed Ward, *Step Backwards*, TORONTO SUN, Dec. 14, 2003, at 71; Carol Goar, *Testing the Limits of Tolerance*, TORONTO STAR, Jan. 16, 2004, at A22; Lynda Hurst, *Ontario Sharia Tribunals Assailed*, TORONTO STAR, May 22, 2004, at A01; Hogben, *supra* note 183; Letter from Heather McGregor, *Fundamentalism Erodes the Rights of Women*, TORONTO STAR, June 5, 2004, at B07; Rita Trichur, *Muslim Community at Odds Over Shariah; Should Faith-Based Tenets be Part of Ontario’s Arbitration Act?*, HAMILTON SPECTATOR, Aug. 23, 2004, at A11; Nadia Khouri, *Keep Mosque and State Separate*, NATIONAL POST, Sept. 21, 2004, at A17.

204. News Release, Ministry of the Attorney General, Former Attorney General and Women’s Issues Minister to Review Arbitration Processes (June 25, 2004), <http://www.attorneygeneral.jus.gov.on.ca/english/news/2004/20040625arbitrationreview-nr.asp>.

205. Marion Boyd, Report, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion*, Dec. 20, 2004, <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/executivesummary.pdf>.

206. *Id.* at 133.

ensure the protection of vulnerable groups.²⁰⁷ Among the safeguards proposed are regulations established to require that arbitration agreements governing family law are in writing and stipulate that certain requirements have been met.²⁰⁸ The report also recommends regulations that govern arbitrators and that approved arbitrators develop a statement of principles for faith-based arbitration.²⁰⁹ The report further recommends safeguards for screening parties that include screening for domestic violence issues and requiring parties to receive independent legal advice.²¹⁰ Boyd also recommends that the Government of Ontario undertake extensive education initiatives designed to reach diverse communities, that appropriate oversight regulations be established, and that continuing policy analysis be conducted on the use of arbitration in matters of family law.²¹¹ The Ontario government spent the next eight months considering this proposal.²¹²

V. THE LEGALITY OF MUMTAZ ALI'S PLAN AND PUBLIC POLICY CONCERNS

A. The Legal Basis for the Tribunals—The Ontario Arbitration Act

Ontario's Arbitration Act allows for the implementation of these Muslim arbitration tribunals and requires that parties consent to arbitration.²¹³ Arbitrators must not show bias to any side and therefore may not use specialized knowledge of Islamic jurisprudence, for example, to decide a matter without allowing the parties to first present their case.²¹⁴ Although

207. *Id.*

208. *Id.* at 135. The agreements should declare that the parties have received a "statement of principles of faith-based arbitration" prior to consenting, details of any waiver of rights or remedies, a statement recognizing that "the judicial oversight of children's issues cannot be waived," and that sections 33 and 56 (governing children) of the Family Law Act continue to apply. *Id.*

209. *Id.* at 136.

210. *Id.* at 137.

211. *Id.* at 138–42.

212. See News Release, Ministry of the Attorney General, Ontario Government Releases Report on Review of Arbitration Process (Dec. 20, 2004), <http://www.attorneygeneral.jus.gov.on.ca/english/news/2004/20041220-boyd.asp>; News Release, Ministry of the Attorney General, Statement by Attorney General on the Arbitration Act, 1991 (Sept. 8, 2005), <http://www.attorneygeneral.jus.gov.on.ca/english/news/2005/20050908arb1991.asp>.

213. Arbitration Act 1991, S.O. 1991, c. 17, § 1 (Can.), available at http://www.elaws.gov.on.ca/tocBrowseCL_E.asp?lang=en ("'[A]rbitration agreement' means an agreement by which two or more persons agree to submit to arbitration a dispute that has arisen or may arise between them."). See ROBERT M. NELSON, NELSON ON ADR ch. 8 (2003).

214. See NELSON, *supra* note 213, at 145.

the Arbitration Act is based on commercial arbitration statutes, it has the ability to govern non-commercial disputes.²¹⁵ Under the Act, arbitrators have broad powers and courts hesitate to interfere with their decisions.²¹⁶

The authorization of the Muslim arbitration tribunals begins with Section 32 of the Act.²¹⁷ Section 32, in allowing the parties to designate the rules of law to be applied by the arbitrator, gives the arbitrator the power under Section 31 to decide the dispute at hand in accordance with the law chosen by the parties.²¹⁸ The Act does not exclude particular rules of law but sets guidelines for conduct and procedure.²¹⁹ After the parties have agreed to submit to arbitration, the broad guidelines of the Act begin with the appointment of arbitrators.²²⁰ Section 11 requires arbitrators to be independent and impartial²²¹ and demands they be forthright about anything in their background that could reasonably lead to bias.²²² The

215. *Id.* at 147. While the Act has the ability to govern non-commercial disputes, Nelson writes that some subject matters should be excluded from arbitration to protect the public interest, including marriage and divorce. *Id.* at 143. *See also* John Tibor Syrtash, *Ontario Has Nothing to Fear*, NATIONAL POST, Sept. 21, 2004, at A17 (pointing out that judicial enforcement of arbitration agreements, including by religious authorities, is nothing new and has existed by statute in Canada since 1889; that the Arbitration Act simply codified certain procedures to make them more fair; and that the Charter guarantees that rulings involving parties that have been treated unequally will not be enforced by the courts).

216. *See* NELSON, *supra* note 213, at 148. Nelson describes the consequences of parties' consent to arbitration:

The Arbitration Act, 1991 imposes what is tantamount to a mandatory stay of court proceedings, with certain limited exceptions, in circumstances where the parties have agreed to submit their dispute to arbitration . . . [T]he court must stay the court proceeding and allow the arbitration to go ahead unless the matter either falls within one of the limited exceptions or is not a matter which the parties have agreed to submit to arbitration.

Id. at 156 (quoting *Deluce Holdings Inc. v. Air Canada*, [1992] 12 O.R.3d 131).

217. Arbitration Act 1991, S.O. 1991, c. 17, § 32(1) (Can.), *available at* http://www.e-laws.gov.on.ca/tocBrowseCL_E.asp?lang=en ("In deciding a dispute, an arbitral tribunal shall apply the rules of law designated by the parties or, if none are designated, the rules of law it considers appropriate in the circumstances.").

218. *Id.* § 31 ("An arbitral tribunal shall decide a dispute in accordance with law, including equity, and may order specific performance, injunctions and other equitable remedies.").

219. *See generally id.* §§ 6–30.

220. *Id.* §§ 9–16.

221. *Id.* § 11 ("An arbitrator shall be independent of the parties and shall act impartially.").

222. *Id.* § 11(2) ("Before accepting an appointment as arbitrator, a person shall disclose to all parties to the arbitration any circumstances of which he or she is aware that may give rise to a reasonable apprehension of bias.").

sections outlining appointment of arbitrators include provisions for challenging arbitrators and the procedures for removal.²²³ If the parties in conjunction with the arbitral tribunal cannot resolve the challenge, Section 13 allows parties to seek the assistance of the court.²²⁴

Section 19 presents some obstacles. Section 19 requires that parties be treated "equally and fairly"²²⁵ and have the opportunity to present their case and respond to the other side.²²⁶ However, this does not necessarily mean that a party has been treated "equally and fairly." Sections 19(1) and (2) set forth two separate requirements.²²⁷ The Muslim arbitration tribunals would presumably meet the requirement of Section 19(2) by allowing each party to present their case in the tribunal, even though the plan suggests it would not require defendants to submit a statement of defense as suggested by Section 25.²²⁸ Whether the Muslim arbitration tribunals would meet the requirement of Section 19(1) is unclear. Some rules of Muslim family law provide for differing treatment of men and women; in areas of divorce and inheritance,²²⁹ for example, both genders would not be treated equally.²³⁰ One could argue from a religious viewpoint that this differing treatment based on gender does not mean that the parties would be treated unfairly,²³¹ but from an objective viewpoint dis-

223. See generally *id.* §§ 13–16.

224. *Id.* § 13(6) ("Within ten days of being notified of the arbitral tribunal's decision, a party may make an application to the court to decide the issue and, in the case of the challenging party, to remove the arbitrator.").

225. *Id.* § 19(1) ("In an arbitration, the parties shall be treated equally and fairly.").

226. Section 19(2) reads, "Each party shall be given an opportunity to present a case and to respond to the other parties' cases." *Id.*

227. See NELSON, *supra* note 213, at 159.

228. Arbitration Act 1991, S.O. 1991, c. 17, § 25(1) (Can.), available at http://www.e-laws.gov.on.ca/tocBrowseCL_E.asp?lang=en ("An arbitral tribunal may require that the parties submit their statements within a specified period of time."); *id.* § 25(2) ("The parties' statements shall indicate the facts supporting their positions, the points at issue and the relief sought.").

229. Although the *Quran* introduced progressive inheritance reforms that included women among possible heirs, Islamic inheritance law continues to favor male relatives. For example, in most interpretations of Islamic law, male children generally receive twice the amount that female children receive. See WAINES, *supra* note 15, at 96.

230. See Marianne Meed Ward, *supra* note 203 (arguing that even if parties voluntarily agree to be bound by religious laws that treat women unequally they would *per se* violate the Canadian Charter).

231. See Syed Mumtaz Ali, *Are Muslim Women's Rights Adversely Affected by Shariah Tribunals?*, <http://muslim-canada.org/darulqadawomen.html> (arguing that women are granted more rights under Islamic law than under Canadian secular law); Ouahida Bendjedou, *The Unexpected Protection of Human Rights Under Shari'a*, LAWYERS WEEKLY, vol. 24, no. 14, Aug. 20, 2004 (Lexis) (arguing that Shari'a provides protections for women and the controversy in Ontario is more indicative of a misunderstanding

tinctions made on the basis of gender would clearly not be equal. Additionally, Section 19 falls under the auspices of Section 3 which allows parties to vary or exclude provisions of the Act except for six sections including Section 19's requirement of equality and fairness.²³²

The inability to vary or exclude the equality and fairness provisions, however, does not make contracting out of these provisions impossible. Because the tribunals would be established on a private contractual basis governed by the principles of contract law²³³ and thus outside of the purview of the public courts, they would allow parties to consent to relinquishing some of their rights in order to be bound by gender-differential Muslim family law.²³⁴ These arbitral contracts would not be subject to review unless relief was sought before a civil court and fell within one of the exceptions of the Act that allow for appeal.²³⁵ These exceptions leave great discretion to the reviewing court to determine if an appeal should be granted.²³⁶ In addition to a potential appeal, the Act also allows a party to seek to have an arbitral award set aside on several grounds including legal incapacity and the failure of the tribunal to treat the party "equally and fairly."²³⁷ However, these provisions depend upon the dis-

of Islam). Cf. DeNeen L. Brown, *Canadians Allow Islamic Courts to Decide Disputes; Sharia Gains Foothold in Ontario*, WASH. POST, Apr. 28, 2004, at A14 (demonstrating that critics of the tribunals fear they will lead to discrimination and are concerned with how the tribunals will decide which Islamic law will apply); Hurst, *supra* note 203, at A01 (demonstrating that many Muslim women fear that women immigrants from majority Muslim countries will be coerced into participating because they do not know their legal alternatives).

232. Arbitration Act 1991, S.O. 1991, c. 17, § 3 (Can.), available at http://www.e-laws.gov.on.ca/tocBrowseCL_E.asp?lang=en ("The parties to an arbitration agreement may agree, expressly or by implications, to vary or exclude any provision of this Act except the following . . . (2) Section 19 (equality and fairness).").

233. See *id.* § 5(5) ("An arbitration agreement may be revoked only in accordance with the ordinary rules of contract law.").

234. See Natasha Bakht, *Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and Its Impact on Women*, 1 MUSLIM WORLD J. HUM. RTS. 1, 4 (2004) (pointing out that the Canadian Charter applies to state actors and does not prohibit private parties from agreeing to apply Islamic law under the Arbitration Act but does note that "Charter values have been imported into disputes between private individuals in order to recognize and redress historic disadvantages endured by women").

235. Arbitration Act 1991, S.O. 1991, c. 17, § 45(1) (Can.), available at http://www.e-laws.gov.on.ca/tocBrowseCL_E.asp?lang=en. For a detailed analysis of the appeal process and its likely impact on religious arbitral awards see Bakht, *supra* note 234, at 9–23.

236. *Id.* § 45(1)(a).

237. *Id.* § 46(1) ("On a party's application, the court may set aside an award on any of the following grounds: 1. A party entered into the arbitration agreement while under a legal incapacity . . . 6. The applicant was not treated equally and fairly, was not given an

satisfied party to seek relief in the public courts and to do so within thirty days, and do not require the arbitral tribunal to inform the party of their rights.²³⁸ If a dissatisfied party did seek relief in the courts, a court may very well find such provisions antithetical to public policy and refuse to enforce a tribunal's judgment even though the Act does not specifically include such a provision. Courts could enforce awards that discriminate against women if they found arbitral agreements were contractually sound.²³⁹

B. Beyond Legality—Public Policy Concerns

The critics of the tribunals, including Muslim women's groups, reject the idea of private tribunals because they fear their potential adverse effects on women.²⁴⁰ They believe the voluntary nature of such tribunals is a fallacy and that the tribunals would coerce many women, especially immigrant women, into participation.²⁴¹ They favor excluding family law

opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator.”).

238. Arbitration Act 1991, S.O. 1991, c. 17, §§ 45–47 (Can.), available at http://www.e-laws.gov.on.ca/tocBrowseCL_E.asp?lang=en. See also Bakht, *supra* note 234, at 8–9 (quoting a letter to the Canadian Council of Muslim Women from the Ontario Attorney General pointing that unjust arbitral awards cannot be dealt with unless they are brought to the attention of the courts).

239. Bakht, *supra* note 234, at 4–5. Bakht describes the consequences of consent to arbitral agreements,

Where . . . parties sign an agreement to abide by a ruling and consent is found to be voluntary, the courts will likely impute knowledge of the system of laws one is submitting to. It is unlikely an argument that one didn't realize or understand the impact of a particular set of rules would be successful particularly, where an attempt to contest the ruling is based on a dislike of the outcome.

Bakht, *supra* note 234, at 14.

240. See, e.g., Canadian Council of Muslim Women, *Concerned About Traditional Religious Interpretations*, LAWYERS WEEKLY, vol. 24, no. 14, Aug. 20, 2004 (Lexis) (arguing that Islam does not require one to abide by Islamic jurisprudence, which is the creation of male jurists living after the time of Prophet Muhammad; that it varies greatly throughout the world; and that it is based on a patriarchal model that discriminates against women).

241. The Canadian Council of Muslim Women voiced their concerns to Marion Boyd,

Our concern is not with those women who are 'comfortable' and knowledgeable about rights in Canada, and who are unlikely to pursue the arbitration process using Sharia/Muslim family law. Our concern is for those of use who are newer immigrants, somewhat excluded due to language or customs, who turn to their traditional sources such as males, and the Islamic Centre or mosque and may not be exposed to mainstream media. These women will be persuaded to try the Sharia route because that is what they know in their coun-

from the Arbitration Act and thereby making the judgments issued by the tribunals unenforceable in the civil courts.²⁴² Although this fails to recognize that the Islamic Institute of Civil Justice or any other private religious tribunals will continue operating nonetheless, they make an important point.²⁴³ Parties will continue to resolve disputes privately based on contractual agreements and many of the judgments will never be disputed in the civil courts. However, the exclusion of family law from the Act would deny the enforceability of many more judgments in the civil courts by removing the presumption of legality afforded by the Act. Disputes that would find their way into the civil courts could still be enforced if a court found that the requisite elements of a contract were established.²⁴⁴ As an alternative, disputes brought directly before the civil courts could be referred to arbitration and mediation that included religious clergy with appropriate judicial oversight.²⁴⁵ Religious arbitration of family disputes has gone on for millennia and will continue to do so but such decisions need not be given the rubber stamp of the Ontario court system.²⁴⁶

tries of origin and that is what is presented to them as part of the religion. If the arbitration process is private and legally binding and this is explained to the women as approved by Ontario and Canadian law, why wouldn't a woman be persuaded to go this route? How would anyone ever hear of any abuse of women's rights?

Marilou McPhedran & Amina Sherazee, Submission, *Review of the Ontario Arbitration Act and Arbitration Processes, Specifically in Matters of Family Law*, Canadian Council of Muslim Women (July 30, 2004), <http://www.ccmw.com> (follow "Muslim Family Law" hyperlink; then follow "Marion Boyd" hyperlink).

242. See Resolution 04-11-01, To Remove Family Law from the Arbitration Act of Ontario 1991, International Campaign Against Shari'a Court in Canada, <http://www.nosharia.com/resolution-04-11-01.htm>.

243. See Syrtash, *supra* note 215.

244. It is highly unlikely that a court would ever order specific performance as a remedy for a broken marriage contract because it could potentially bind a woman in marriage against her will and therefore be against public policy; a court could conceivably order a woman to sacrifice her dowry in order to secure a divorce based on a valid prenuptial agreement. See generally Estin, *supra* note 55.

245. This has been in done in some United States jurisdictions. See Quraishi & Syeed-Miller, *supra* note 120.

246. It is worth emphasizing that even Muslim women's groups who oppose the Islamic Institute of Civil Justice do not reject Islam but rather particular male-dominated interpretations of it. They do not view Islam as incompatible with the ideals of liberal democracy but rather as a religion that requires its adherents to strive for justice and equality in their daily lives. For a discussion of Islam and feminism see Sa'diyya Shaikh, *Transforming Feminism: Islam, Women, and Gender Justice*, in *PROGRESSIVE MUSLIMS ON JUSTICE, GENDER, AND PLURALISM* 147–62 (Omar Safi ed., 2003).

VI. MODELS FOR REFORM

The model of private tribunals allowed for under the Ontario Arbitration Act is a close cousin of the multicultural approach, called the *religious particularist model* by multicultural theorist and pragmatist, Ayelet Shachar.²⁴⁷ Under the pure form of this model, personal law is delegated completely to the Muslim community and Muslim personal law would govern Muslims who choose to opt into the system, providing them little alternative for opting out.²⁴⁸ Based on a strong multiculturalist archetype,²⁴⁹ this gives the Muslim community complete sovereignty over their affairs in this area.²⁵⁰ An approach delegating complete sovereignty to a religious community without reserving protection for individual rights, the approach ultimately sought by Mumtaz Ali, is not optimal for Ontario or any liberal democracy.²⁵¹

Currently, the Ontario Arbitration Act, although not creating a total religious particularist system, comes close to this approach. Under Ontario's Arbitration Act, individuals must first consent to the tribunal's jurisdiction²⁵² but are then bound by its ruling unless they dispute it in civil court.²⁵³ Rulings by the Muslim tribunal would only be overturned or modified in cases of invalid contractual agreements or gross violations of public policy.²⁵⁴ Allowing individuals to privately legislate and adjudicate matters of family law would remove vulnerable groups, like immigrant women and children, from the specter of the public court system.²⁵⁵ Marion Boyd's recommendations seek to expand the circumstances under which the decisions issued by the tribunals could be appealed and implement a system that would provide independent legal advice to parties. However, they fail to realize that the independent legal

247. The opposite of the *religious particularist model* would be the *secular absolutist model* which gives complete power to the state in matters of family law and excludes religion entirely from the public sphere. Under this model, a religious authority presiding over a marriage ceremony has only symbolic value. SHACHAR, *supra* note 4, at 72–78.

248. An example of this is the delegation of personal law to religious communities used by Israel today, a country with a diverse religious population, whose laws are otherwise secular. See *supra* note 118 for further explanation.

249. A strong multicultural model favors a great deal of accommodation and independence for minority groups. SHACHAR, *supra* note 4, at 28–32.

250. This is the opposite of the *secular absolutist model* which strictly forbids delegation to religious groups. *Id.* at 72–78.

251. See generally *Oh! Canada!*, *supra* note 6.

252. Arbitration Act 1991, S.O. 1991, c. 17, § 1 (Can.), available at http://www.elaws.gov.on.ca/tocBrowseCL_E.asp?lang=en.

253. *Id.* § 37.

254. *Id.* § 45.

255. See Bakht, *supra* note 234, at 26–28.

advice an immigrant woman receives would likely be from a lawyer in her respective community who may approve of skewed interpretations of Islam. It also overlooks the idea that arbitration tribunals established through a provincial statute should receive sufficient governmental oversight such as the kind grounded in a public institution like the Ontario courts.

Decisions issued by the tribunals would have a presumption of legitimacy in the Ontario court system when challenged by dissatisfied Muslims. While the courts should have an obligation to take into account the religious circumstances of the parties, a religious judgment should not automatically gain the rubber stamp of the civil court.²⁵⁶ Additionally, Canada would give formal recognition to judgments issued by an Islamic organization that in no way represents the Canadian Muslim community.²⁵⁷ Because of its establishment under the Arbitration Act, judgments issued by the Islamic Institute of Civil Justice would have not only a presumption of legitimacy in the courts but would gain recognition as authoritative decisions of the Muslim community. A determined minority of Canadians, who practice Islam, a religion with no central hierarchy, could be viewed as the legitimate voice of all Canadian Muslims.²⁵⁸ Groups who choose not to participate in the Islamic Institute of Civil Justice or form their own tribunals could be viewed as fringe groups when in fact they actually represent the majority of Canadian Muslims. Rather than mistakenly entrust the whole gamut of personal law to private legislation, Ontario must find a way to accommodate religious needs with the individual protections that make religious freedoms possible.²⁵⁹

256. See Faisal Kutty & Ahmad Kutty, *Shariah Courts in Canada, Myth and Reality*, 2004, <http://muslim-canada.org/kutty.html> (arguing that the most difficult questions surrounding the establishment of the tribunals is what interpretation of Islam will govern and that those interpretations influenced by tribal and cultural practices that discriminate against women must be excised). See generally NASIR, *supra* note 15; ESPOSITO & DELONG-BAS, *supra* note 15; DENNY, *supra* note 2.

257. It is difficult to ascertain the number of members of the Canadian Society of Muslims and of those members how many support the Islamic Institute of Civil Justice.

258. See DENNY, *supra* note 2, at 199–200.

259. In his discussion of the interaction between law and religion, Peter W. Edge points out that the critics of giving legal consideration to religion believe it to be unnecessary. They believe it unnecessary because the individual interest in performing religious dictates is already considered through the government's general interest in assuring individual autonomy. This criticism, however, fails to perceive that religious practice for many is not an individual affair but rather is based on communal notions of identity. See EDGE, *supra* note 110, at 17. There are several arguments for giving religion legal consideration. One is based on the importance of religion in the faithful's life. Edge quotes D.O. Conkle,

Applying a *joint governance model*²⁶⁰ would stray from an “either-or”²⁶¹ approach and would recognize that individuals have allegiances to more than just the state while also recognizing that discrimination occurs within religious groups and that vulnerable minorities within the minority must be protected.²⁶² There is no perfect example of the *joint governance model*, but its underlying principles serve as a guide to approach the dilemma facing Ontario. Among the strongest versions of the joint governance approach is the *model of transformative accommodation*.²⁶³ The

Religious beliefs . . . form a central part of a person's belief structure, his inner self. They define a person's very being—his sense of who he is, why he exists, and how he should relate to the world around him. A person's religious beliefs cannot meaningfully be separated from the person himself: they are who he is.

Id. at 18 (quoting D.O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1164–65 (1988)). There are other reasons for giving legal consideration to religion. A second argues that because religion is given unique consideration in international law it should be given the same in domestic law. A third argues that the religious adherent “suffers a special harm” when her practices contradict with secular law. A fourth argues that there is a link between collective interests and religion and giving recognition will help contribute to pluralism. A fifth argues that religious communities “benefit society as a whole” and so should be protected. *Id.* at 17–19. Edge concludes that each of the arguments has merit but a flexible approach should be adopted. He writes,

[t]he religious interest should always be considered, because of the strong coincidence of the religious interest and the elements [of the various arguments]. The extent to which it should be considered, however, will depend upon how far particular factors can be identified in the case which strengthen or weaken the assumptions upon which those elements depend.

Id. at 21.

260. SHACHAR, *supra* note 4, at 88–116. This approach of multicultural accommodation “strives for the reduction of injustices between groups as well as the enhancement of rights within them.” *Id.* at 87.

261. *Id.* at 85. The either-or approach insists that an individual must either be primarily a citizen or primarily a religious person. *Id.* at 86.

262. Shachar has frequently spoken of *the paradox of multicultural vulnerability*, which recognizes the problems created by multicultural accommodation when power is delegated to minority groups. This creates “the minority within the minority” which may be discriminated against within the group. See, e.g., Ayelet Shachar, *Reshaping the Multicultural Model: Group Accommodation and Individual Rights*, 8 WINDSOR REV. LEGAL & SOC. ISSUES 83 (1998); Shachar, *supra* note 38; SHACHAR, *supra* note 4.

263. SHACHAR, *supra* note 4, at 117–45. Another possible variation of the *joint governance model* is the “consensual accommodation” approach, which works like the Trinidad Muslim Marriage and Divorce Act. The Trinidad and Tobago Act delegates the regulation of Muslim marriage and divorce to the Muslim community but retains a secular option. An individual consents to the jurisdiction of this Act by marrying according to its regulations and once that choice is made the individual is bound to divorce by the Act as

first of its underlying principles requires that no single arena be delegated entirely to a religious community but rather that shares of that arena are delegated.²⁶⁴ The second requires that neither the state nor the religious group ever gain exclusive jurisdiction over areas of contention but must instead create an environment where the state and the group compete for the allegiance of the individual.²⁶⁵ In such an arrangement, the state could retain ultimate jurisdiction over custody while the religious group could retain ultimate jurisdiction over the rules of marriage and group membership. The third principle requires that the individual always maintain a choice between the competing options.²⁶⁶ When group members, whether they are in their citizen capacity or religious capacity, retain the right to ultimately opt-out of either, the group is encouraged to pay attention to its constituency. In order to make the system viable, opting-out would be justified only when the group has failed to provide an adequate remedy to an individual within its governance seeking a solution.²⁶⁷ In seeking to establish a *model of joint governance* the delegation of some powers to a religious group can spark an internal debate and hopefully transformation.²⁶⁸

VII. CONCLUSION

There is support for the idea that Canada has already begun to apply a *joint governance model*. The possibility that private Islamic tribunals will issue court-enforceable judgments has led to a lively debate both within the Canadian Muslim community and within Canadian society as a whole.²⁶⁹ It has brought the reality of private family arbitration to the forefront of public discussion. The willingness of the Ontario government to consider the implications for Muslim women, the minority within the minority, shows an increasing willingness to recognize that Canadian citizens may have multiple allegiances. Marion Boyd's report takes seriously the concerns of proponents and opponents of the tribunals and has made recommendations that will increase discourse in the com-

well. The problem with this variation is that like the Trinidad & Tobago Act, it has no provision for opting out of the system once a choice is made to marry according to Muslim law. Individuals later regretting their choice to marry under the Act have no way of ending its sovereignty. *Id.* at 103–09. See Muslim Marriage and Divorce Act, 1961, Ch. 45:02 (Trinidad & Tobago).

264. SHACHAR, *supra* note 4, at 119.

265. *Id.* at 120–21 (Shachar refers to this as the “no-monopoly rule.”).

266. *Id.* at 122.

267. *Id.*

268. *Id.* at 118.

269. See *supra* note 203.

munity.²⁷⁰ Such a model is establishing “an ongoing dialogue between different sources of authority as a means of eventually improving the situation of traditionally vulnerable group members.”²⁷¹

On September 11, 2005, Ontario Premier Dalton McGuinty announced that Ontario would outlaw religious arbitration entirely.²⁷² Responding to political pressure, McGuinty promised to introduce legislation, but at this time, it is unclear what form the legislation will take.²⁷³ Amending the Arbitration Act to exclude court enforceability of religious judgments is advisable. In his response, however, McGuinty should not stifle the debate altogether. Religious tribunals will continue privately and the issues of religious accommodation will not disappear.

In its continuing dialogue, Ontario should look to the examples of England, Australia, and the United States. The themes running through these nations’ attempts at reconciling religious and secular law will assist Ontario and other liberal democracies in their own efforts at reform. The judiciary and legislatures must be willing to consider parties’ religious affiliations, particularly in family disputes.²⁷⁴ The small number of judges already considering these affiliations must encourage the expansion of their approach. Legislatures must tackle the legal dilemmas facing religious communities and take bold steps to accommodate their needs, as has been seen in New York and England.²⁷⁵ Initiatives must take religious concerns seriously while protecting the individual’s right to opt-out of the system. Most importantly, members of the Muslim community must be willing and eager participants in both the Muslim community and the democratic public sphere. They must expose new immigrants not only to the resources of the Muslim community but educate them about the legal tools available in their adopted homeland, with equal responsibility borne by the government as well.

Canada must embrace a model that recognizes that individuals do not have an either-or allegiance to the state versus their religious community and that the state cannot endorse a model giving exclusive, court-enforceable decision making power to one segment of the Muslim community. While individuals will retain the right to submit their disputes to

270. See Boyd, *supra* note 205.

271. SHACHAR, *supra* note 4, at 118.

272. See generally Colin Freeze & Karen Howlett, *McGuinty Government Rules Out Use of Sharia Law*, GLOBE & MAIL (Can.), Sept. 12, 2005, at A1; Prithi Yelaja & Robert Benzie, *McGuinty No Sharia Law; Move Stuns Sharia Foes, Supporters*, TORONTO STAR, Sept. 12, 2005, at A01.

273. *Id.*

274. See *supra* note 88.

275. See N.Y. DOM. REL. LAW § 253 (McKinney 1999); Divorce (Religious Marriages) Act, 2002, c. 27 (Eng.).

a private religious tribunal and reserve the possibility that the civil courts will enforce such private contractual agreements, issues of family law should be excluded from the Arbitration Act. The alternatives explored by England, Australia, and the United States have begun to find ways to accommodate Muslim family law, perhaps not perfectly, but with an ever growing emphasis on awareness, integration, and respect. These approaches provide practical alternatives to Muslim tribunals established under the Arbitration Act in Ontario. These alternatives do not appease the religious community—rather, they include them. They are pragmatic attempts to begin a dialogue between and within communities and among society as a whole. This dialogue seeks to develop modes of cultural accommodation that recognize that the majority approach can be inherently biased while the minority approach can infringe upon individual rights. Change, of course, is not easy, and while these approaches still need revision, they are most importantly a foundation upon which to build meaningful transformation.

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